PUBLIC ACCESS TO THE SHORELINE
LEGAL ASPECTS

COUNTY OF HAWAII
MARCH 1982

SHORELINE PUBLIC ACCESS

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LEGAL ASPECTS

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Acknowledgements.....

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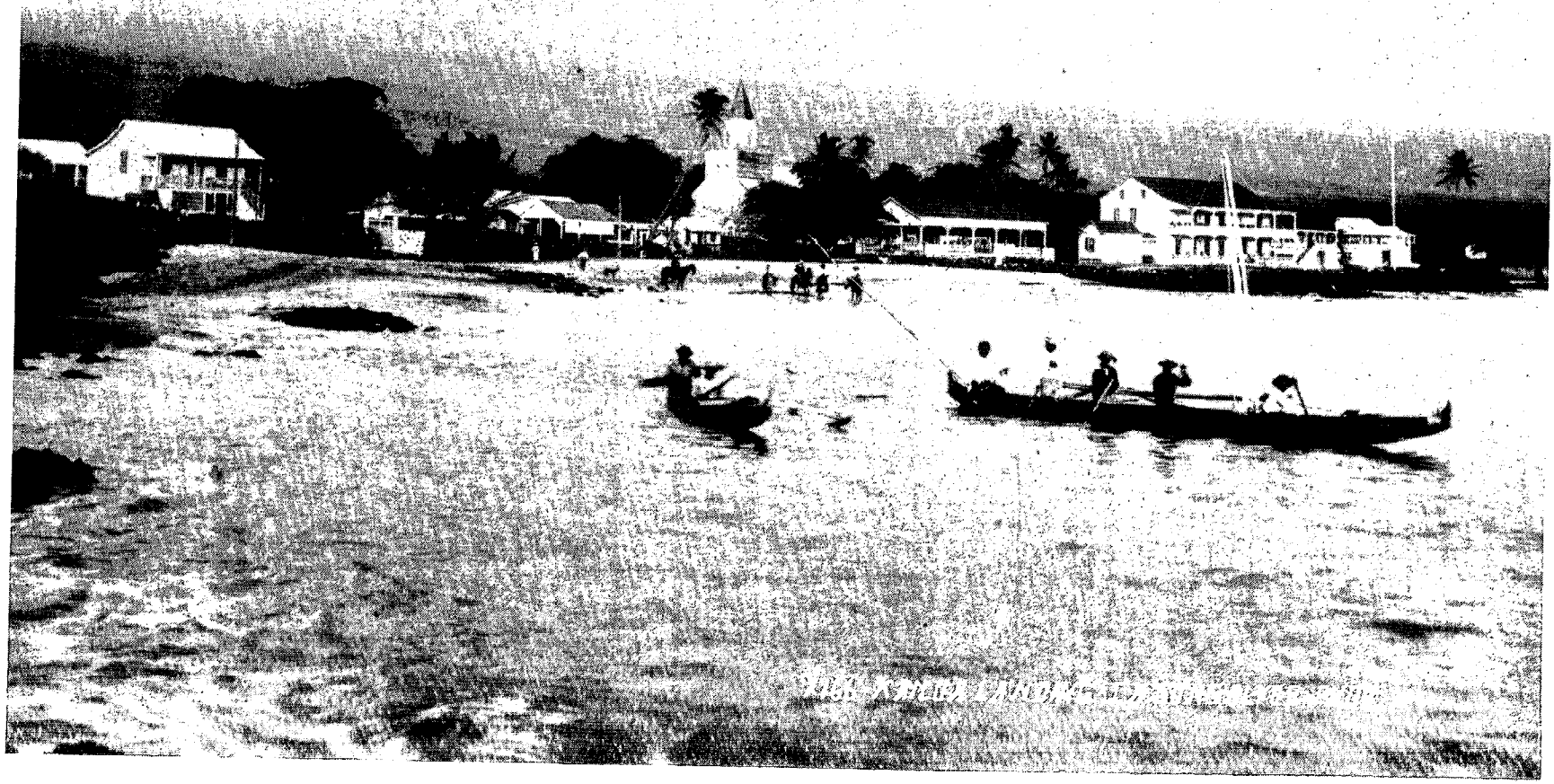

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Shoreline
PublicAccess

In response to the intense pressures upon, and because of the importance of coastal area, the Federal Coastal Zone Management (CZM) Act was enacted by Congress in 1972. This act provided assistance and encouragement to participating coastal states to develop and implement localized management programs for the protection and effective development of their coastal resources.

The Hawaii Coastal Zone Management Program, approved in 1978 by the Federal Office of Coastal Zone Management, provides the basis for the State and the Counties to implement the overall intent of the national act. One of the primary goals of the State and Federal CZM Program is to provide coastal recreational opportunities accessible to the public, and to assure that adequate public access is provided to beaches, recreation areas and natural reserves along the shoreline.

Consequently, to assure that adequate public access is provided in accordance with the legislative intent, the Planning Department, with the support of the Hawaii Coastal Zone Management, initiated a public shoreline access program for the County in 1978.

The first phase of this program which was completed in September of 1979, involved the inventorying of existing public accesses to and along the shoreline, an inventory of the shoreline areas and nearshore waters of major recreational uses, and areas of major environ-

ment aesthetic, and ecological importance. This inventory provides the baseline information in understanding current coastal conditions, accessibility, and resources.

The second phase involved the development of guidelines and standards for the identification of areas where additional public accesses are particularly necessary and/or desirable and for the design of public access systems.

The current phase involved research on legal considerations and issues relating to the implementation of such a program. This report contains the findings of the research performed.

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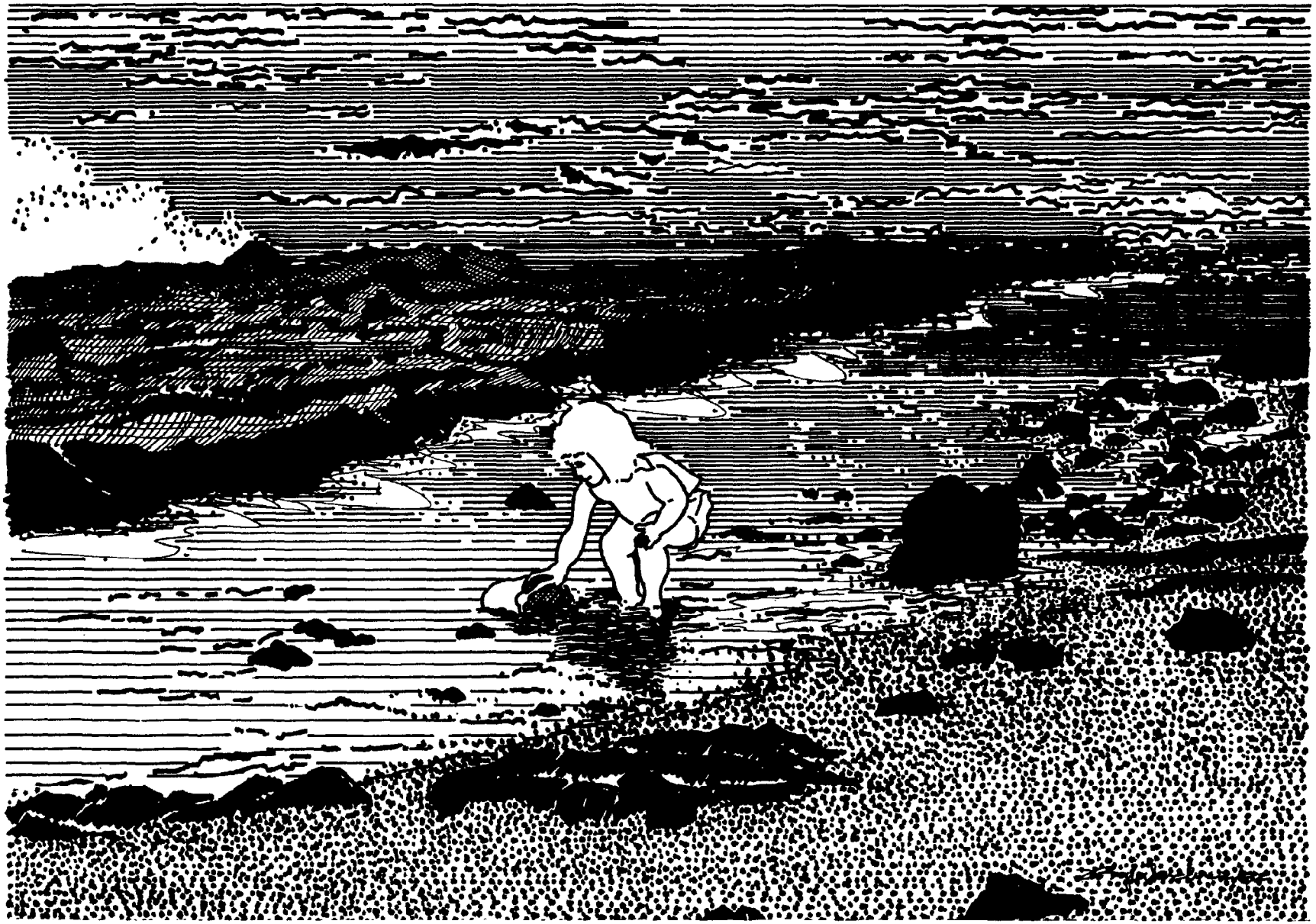

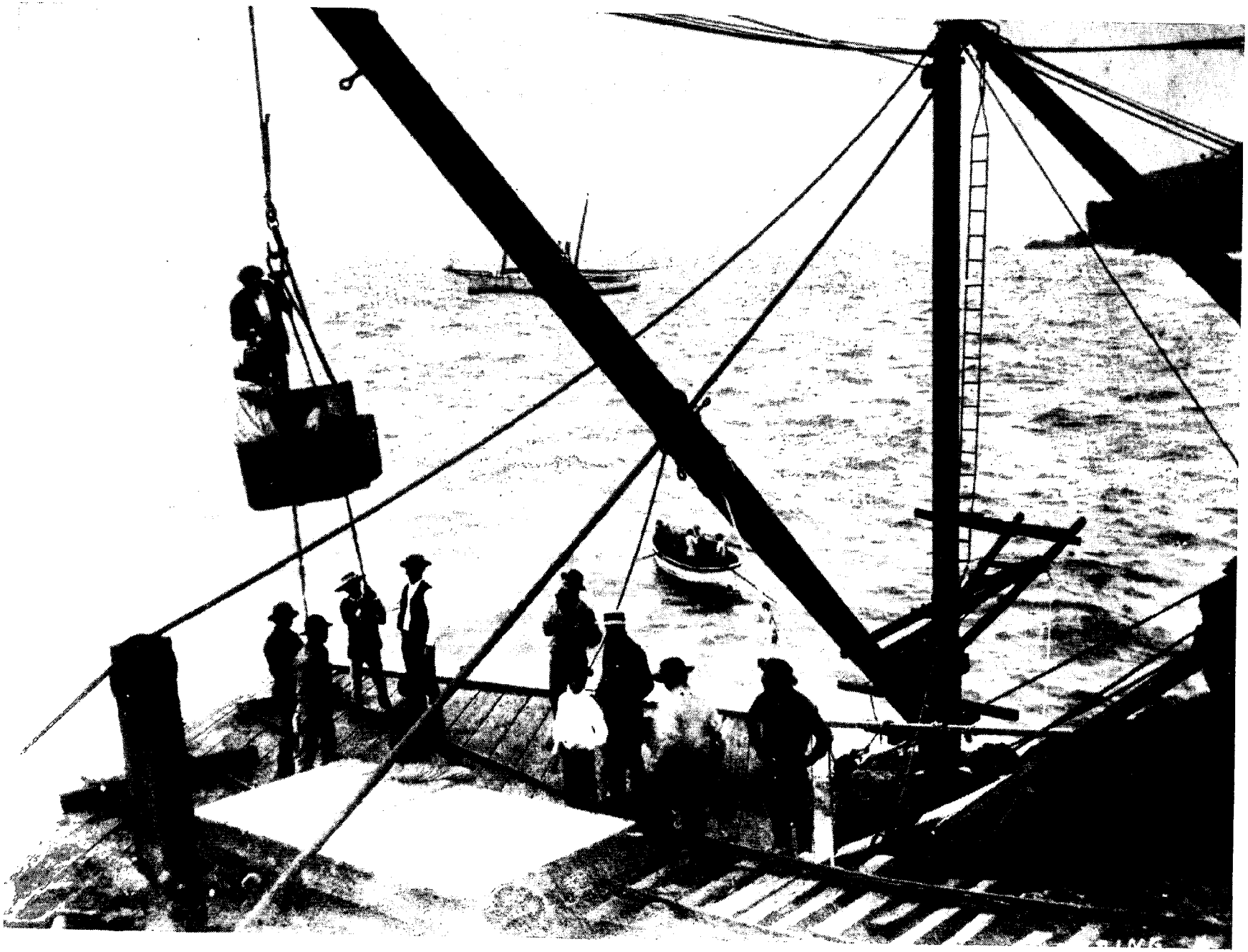

The Coastal Zone Management Act, enacted by Congress in 1972, attempts to meet the need for protective legislation which, in recent years, has arisen in the face of increasing development and exploitation of coastal areas. The Act provides for a partnership between federal and state governments by encouraging states to develop comprehensive coastal zone management programs with federal funding support.

In 1977, the State of Hawaii legislature enacted the Hawaii Coastal Zone Management Act(Chapter 205A, Hawaii Revised Statutes), which mandated the creation of a coastal zone management program. The State became eligible for federal funding upon approval of the program by the Secretary of Commerce in November, 1978. Such funding is now in jeopardy.

The State has enacted a number of laws which address the subject of public access to recreational areas. Shoreline access legislation has generally been aimed at the protection of the public's right to the use and enjoyment of the beach through the authorization of access acquisition. Following is a brief survey of relevant sections in Hawaii Revised Statutes (Hereinafter "HRS").

Sec. 46-6.5, HRS: Dedication of rights-of-ways and easements to counties by subdividers.

HRS 46-6.5 was enacted in 1973, and mandates that each county adopt ordinances which require developers and subdividers to dedicate rights-of-way or easements for pedestrian travel for public access from public highways and streets to beach and mountain recreation areas. County planning commission approval of development projects is conditioned upon fulfillment of this requirement.

This statute also provides that the counties assume the cost of improvements to and maintenance of the rights-of-way upon dedication and county acceptance.

County responses to Sec. 46-6.5 have been varied:

Kauai County

Subdivision Ordinance, Sec. 2.09 provides that the Planning Commission may require dedication of adequate public accessways not less than the minimum width specified in the Comprehensive Zoning Ordinance to publicly owned lands or water. In addition, the Commission may require preservation of all historic and archaeological sites known to exist or subsequently discovered in the parcel to be subdivided.

Zoning Ordinance, Sec. 3.017D also states that the Planning Commission may require dedication of public access-ways at least six feet in width.

Both Kauai ordinances appear to be highly discretionary in nature. Neither compels the Planning Commission to require subdivision exactments to shoreline areas.

Maui County

Subdivision Ordinance, Sec. 11-1.9(d)(3)(c) provides that where a subdivision fronts along a shoreline or other public use or recreational area, rights-of-way to those areas must be created at intervals no greater than 1,500 feet except as otherwise provided. Rights-of-way may also be consolidated to provide sufficient area for vehicular access.

(Note that the wording of Sec. 11-1.9(d)(3)(c) presents an issue as to whether developments or subdivisions which do not front the shoreline or other recreational areas are exempt from the requirement of providing access through the development to the beach. Note, also, that the Maui ordinance is broader than those of other counties since it allows for both vehicular and pedestiran traffic.)

Honolulu

Subdivision Ordinance, Sec. 22-6.3 defines the scope of the ordinance and states that it applies not only to those parcels fronting the shore but to parcels which lie in the path between recreational areas and public highways or streets as well. This sections also mandates that the City of Honolulu assume the costs of improvements to and maintenance of the public access way.

(Note that Kauai and Maui Counties require dedication, but ignore the maintenance issue).

Subdivision Ordinance, Sec. 22-6.4 sets forth the requirements for the form and location of the rights-of-way. Location and alignment must be consistent with the intent and purpose of the article and must implement the intent and purpose of the General Plan and Development Plan of the City. Considerations such as topography and other existing access locations must also be evaluated.

Hawaii County

The County of Hawaii has promulated neither public access ordinance nor subdivision or zoning code sections which impose an access requirement. This silence may indicate the inapplicability of 46-6.5 to areas like West Hawaii where the nearest public highways and streets may be quite distant from shoreline areas.

It should be noted, however, that several public access-related provisions are contained in the County's General Plan which was adopted by Ordinance 439. For example, the County has stated that the shoreline of Hawaii should be maintained for recreation, educational, and scientific uses in a manner designed to protect resources and maximize public benefit. (General Plan at 24.) Similarly, one of the recommendations for effectuation of the Plan states that the County shall adopt an on-going program featuring identification, designation and acquisition of areas of recreational importance. Specifically, public access to the shoreline shall be provided in accordance with the program adopted. (General Plan at 62-63.)

COMMENT

The effectiveness of 46-6.5 is unclear. Subdivision exaction is relatively inexpensive and poses a minimum of administrative problems, but a major disadvantage of exaction is that it applies only to those lands which are to be developed. The statute could not be implemented in areas developed prior to enactment.

Sec. 115-1 et seq., HRS: Acquisition of Rights-of-Way by Counties.

Sec. 115-1 et seq. was enacted in 1974, in response to the limitations of Sec. 46-6.5 HRS. Thus, this section deals with the problem of access over privately owned lands as yet undeveloped or developed before enactment of Sec. 46-6.5.

Sec. 115-2 provides for County acquisition of lands for public rights-of-way and public transit corridors where the provision of Sec. 46-6.5 are inapplicable.

Sec. 115-3 establishes the maximum distance between public rights-of-way as "reasonable intervals," taking into consideration of the topography and physical characteristics of the land.

Sec. 115-4 mandates that the right of access to the shoreline includes the right of transit along the shoreline, so long as public safety is maintained.

Sec. 115-5 provides that the right of transit exists along the shoreline below the private property line; the private property line being the line along the upper reaches of the wash of the waves, as evidenced by the vegetation or debris lines left by the wash of the waves. In areas where the topography of the land makes public transit along the shore unsafe, the counties shall establish, by condemnation, public transit corridors along the makai boundaries of the property lines.

Sec. 115-6 adopts the provisions of Chapter 101, which prescribes procedures for acquisition by eminent domain.

Sec. 115-7 outlines State and County co-sponsorship of programs. The Department of Land and Natural Resources (DLNR) shall enter into acquisition agreements with the council of any county provided that the county matches those funds appropriated by the State legislature. Development and maintenance of rights-of-way and public transit corridors are the responsibility of the various counties.

Sec. 115-8 provides that the DLNR shall be the expending agency of all sums appropriated for the purposes of the chapter.

COMMENT

Chapter 115's provision for acquisition by eminent domain is a major disadvantage. Condemnation proceedings necessarily involve the constitutional problem of demonstrating that the taking is for a public purpose and is accomplished by just compensation. It is questionable whether acquisition programs which already suffer from inadequate funding can successfully absorb costly just compensation expenditures and the administrative and legal fees attendant upon condemnation litigation.

In 1975, the legislature appropriated $1,000,000 to be used to match county funds for the acquisition of lands for public rights-of-ways and transit corridors (Act 195). However, the legislation provided that the counties were to be the initiating bodies, with the responsibility of requesting grants from the DLNR. To date, county response has been poor.

Sec. 171-26, HRS: Rights-of-Way to the Sea and Game Preserves

Sec. 171-26 provides that, before making disposition of any public lands, the Board of Land and Natural Resources must lay out and establish over such lands a reasonable number of rights-of-way.

The definition of "public lands" for the purposes of this statute includes all lands or interests in land classed as government or crown lands prior to August 15, 1895, or acquired or reserved after 1895 by purchase, exchange, escheat or eminent domain.

(Secs. 171-50 and 171-2, HRS).

This statute does not apply to lands which were leased or sold to private parties before the effective date of the statute. Moreover, the definition of "public lands" operates to exclude those lands set aside by law for federal control (Sec. 171-2(2), HRS), lands affected by the Hawaiian Homes Commission Act of 1920 (Sec. 171-2(1)) and lands to which the Hawaii Housing Authority holds title (Sec. 171-2(7)). Note, also, that this statute does not apply to privately owned lands.

Sec. 183-15, HRS: Surrender of Private Land.

Sec. 183-15 provides that private property owners who surrender lands in fee or less than fee to the government for a term not less than twenty years can receive an abatement of land taxes.

The grant of tax incentives to private property owners would help to circumvent the problems created by a taking by eminent domain; surrender cannot be equated with a taking since a surrender is dependent upon the voluntary action of the landowner. However, the volition aspect of surrender makes unclear the potential effectiveness of the statute in securing access to the shoreline.

(Sec. 264-1 recognizes common law dedication. It is probable that, under this statute, the requirements of an implied dedication would have to be met---intent to dedicate with acceptance by the public through use.)

Sec. 520-4, HRS: Liability of owner limited.

This section furthers the legislative intent to encourage private landowners to make their land and water areas available to the public for recreational purposes. It provides that a landowner who allows any person to use property for recreational purposes does not extend any assurance that the premises are safe for any purpose, does not owe a duty to such a user as an invitee or licensee, and is not liable for any injury to such a user or to property injured by the user.

Sec. 708-816, HRS: Defense to Trespass

This statute is designed to protect persons who have entered upon government land and traversed established and well-defined roadways, pathways or trails leading to public beaches.

This section applies to lands owned in fee by the Federal and State governments and any county or municipality, including lands under lease to private persons. However, Sec. 708-816's protection does not extend to individuals who enter lands owned in fee by private entities.

The statute does not create a right of access to public beaches. It merely protects those who cross government lands to reach a shoreline area. It is unclear whether both pedestrian and vehicular traffic are permissible and the statute is inapplicable in those cases where individuals have entered upon government property to reach inland recreational areas.

CHAPTER 2 THE JUDICIAL PROCESS: NINE LEGAL THEORIES FOR SAFEGUARDING PUBLIC SHORELINE ACCESS

CHAPTER 2 THE JUDICIAL PROCESS: NINE LEGAL THEORIES FOR SAFEGUARDING PUBLIC SHORELINE ACCESS

Introduction

One method for securing access to and along the shoreline of the County of Hawaii is to establish in court that the public is entitled by law to particular rights-of-way. The State, the County of Hawaii[1], and private parties representing the public in a class action[2] may bring law suits to recover public coastal accesses. The State or County could attempt to acquire rights-of-way also through condemnation proceedings.[3] However, condemnation would result in large public expenditures for compensation to private land owners and would most likely face significant opposition from developers, taxpayers, and the large land-owners of Hawaii.[4]

An array of legal theories and doctrines can be used in a lawsuit to argue a public right to a beach access. Nine of these theories are particularly relevant to the public access issue in Hawaii:

1. Ancient Hawaiian tradition, custom, practice, and usage;
2. Common law custom and usage;
3. Easement by prescription;
4. Implied dedication by private owner of public right-of-way;
5. Way of necessity;
6. Public trust;
7. Implied reservation of an easement;
8. Express reservation of an easement;
9. Section 7-1 of Hawaii Revised Statutes.

As many of these theories as appropriate to the facts of the case should be utilized in a judicial proceeding in order to offer the court a wide selection of theories and remedies.[5] A general discussion of each of these legal theories follows below.

A. Ancient Hawaiian Custom and Usage

Ancient Hawaiian custom and usage originated in various rules and beliefs that the several small kingdoms of the Hawaiian islands each followed prior to unification under Kamehameha the Great during the years from 1795 to 1810.[6] In ancient Hawaii, the chief and the common people held customary rights. They were free, for example, to exercise communal rights of access to the mountains and the ocean to obtain fish, fuel, canoe timber, and birds.[7] Because the Hawaiian had no written language until it was introduced by the missionaries, these ancient Hawaiian customs were passed orally from generation to generation.[8]

Foreign settlers brought with them the English common law, which greatly influenced the development of the national law of the Hawaiian kingdom.[9] However, in early cases the Hawaii courts often rejected English common law rules because of contrary established Hawaiian customs.[10]

To clarify the situation and to give direction to the courts, the legislature passed the following statute on November 25, 1892:

> The common law of England, as ascertained by English and American decisions, is hereby declared to be the common law of the Hawaiian Islands in all cases, except as....fixed by Hawaiian judicial precedent, or established by Hawaiian national usage.....[11]

The effect of this statute, which was succeded by Section 1-1, HRS, is to require the use of English common law unless the court finds an established Hawaiian custom in contravention of the English common law.[12]


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PTION OF MAUNA LOA. LAVA ADVANCING UPON HOOPULOA LAND
HEIGHT OF LAVA FLOW 30 FT. - WIDTH 1500 FT.

The Hawaii Supreme Court has recognized in its decision of Application of Ashford that Hawaii's land laws are unique in that "they are based on ancient (Hawaiian) tradition, custom, practice, and usage".[13] The meaning of "ancient" was not clarified until the 1970 Hawaii Supreme Court decision of State v. Zimring.[14] In deciding whether lava extensions belonged to the State in trust for the people or to adjacent land-owners, the court found that ancient "Hawaiian usage" pursuant to Sec. 1-1, HRS was usage that existed prior to the incorporation of the English common law in 1892.[15] Thus, in a claim of public access, the customary use of the access must have been one established and in use prior to November 25, 1892.

The substantive aspects of the ancient custom doctrine permits the court to find Hawaiian property rights which are outside the common law. The procedural or evidentiary aspect of the doctrine allows the court to admit testimony from kamaaina witnesses to establish ancient usage. The so-called kamaaina witness rule dates back to the time of the Great Mahele in 1848 when kamaaina witnesses aided land surveyors and the Land Commission in defining land boundaries.[16] Rule 803, paragraph (b)(2) of the Hawaii Rules of Evidence codifies the kamaaina witness rule.[17] The Hawaii Supreme Court, in Ashford, recognized this long-established rule to permit two residents from the area to testify to hearsay declarations of other kamaainas.[18] In a 1969 case, Palama v. Sheehan, the court admitted testimony by longtime residents on the location of trails used by their parents and grandparents.[19] This case is particularly important in that it recognized ancient rights-of-way running from the sea to the mountains. The court held that the defendants, kuleana holders, were entitled to a right-of-way over the plaintiffs' land based on two theories: 1) ancient Hawaiian custom and 2) reasonable necessity. However, the theory of ancient custom seems to have been dicta rather than the real basis of the holding.

One commentator has suggested that under the reasoning of Palama, a public right-of-way is possible based on either of the court's theories.[20] Because this case dealt with a private easement, any application of this case to support a claim of a public easement based on ancient usage would be an extension of the holding. Plaintiffs could argue under the reasoning of Palama and Ashford, however, that the courts should recognize a public right to access to a particular beach or portion of the coastline under the judicially recognized theory of ancient custom and usage. To prove such a claim plaintiffs would have to find long-time residents who could testify as kamaaina witnesses to establish the location and ancient (pre-1892) use of the right-of-way.

B. Common Law Custom

The English common law is part of the common law of Hawaii under Sec. 1-1, HRS.[21] The ancient English doctrine of common law custom originated in feudal England before a system for recording land rights had been devised.[22] The custom evolved under the belief that a usage which had endured for centuries must have been founded on a legal right conferred in the distant past,[23] and so should be recognized even though never formally recorded.

Until recently, the application of the English common law custom had been a dead doctrine, applied in only a few old New Hampshire cases.[24] In State ex rel. Thorton v. Hay, the Oregon Supreme Court breathed life into this doctrine.[25] The court found that the public had used and enjoyed the dry sand area of a beach since the

start of the state's history[26] and held that this usage amounted to a valid custom.[27] The public was entitled to recreational rights in the beach without regard to the title of record held by private landowners.

The Thorton court analyzed the customary use in terms of the seven traditional requirements for establishing a law by custom as outlined by Blackstone's treatise on English law.[28] A custom must be 1) ancient, 2) exercised without interruption, 3) peaceable and free from dispute, 4) reasonable, 5) certain, 6) obligatory, and 7) not repugnant or inconsistent with other customs or laws. The court held that a public use was sufficiently immemorial if it could be traced back to the dawn of an area's political history, even if that were only a century ago.[29] In this fashion, the court countered the argument of other states which had rejected the doctrine on the basis that no American custom could be old enough to be immemorial.

Certain language used by the court in Thorton indicates that it recognized a public right to all Oregon beaches:

> Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly.[30]

Read broadly, this decision would considerably expand the English doctrine of custom which had applied only to narrowly defined geographic localities.[31] The Thorton decision can also be construed more narrowly as applying only to the beach that was the subject of the lawsuit.[32] This would follow more closely the established doctrine, but seems contrary to the court's language.

In one of Hawaii's seaward boundary cases, County of Hawaii v. Sotomura, the Hawaii Supreme Court favorably cited the customary right doctrine employed in Thorton. The court stated that:

> The Ashford decision was a judicial recognition of the longstanding public use of Hawaii's beaches to an easily recognizable boundary that has ripened into a customary right. Cf. State ex. rel. Thorton v. Hay, 254 Ore. 584, 462 P2d 671 (1969). Public policy, as interpreted by this court, favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible. County of Hawaii v. Sotomura, 55 Haw. 176, 181-182 (1973).[33]

The doctrine of English Common law custom could be used to enhance the argument for a public right-of-way based on ancient Hawaiian custom and usage or as a separate basis for judicially recognizing a public access. Blackstone's seven requirements would still have to be met. The Hawaii courts may follow the Oregon Supreme Court and trace the custom back to the organization of the government in 1846, rather than to the later year, 1892, required to establish ancient Hawaiian custom.

C. Easements by Prescription

Prescription is a common-law theory dependent upon statute and is a mode for acquiring title to incorporeal hereditaments, such as easements and rights-of-way by long continued use and enjoyment.[34] Largely because of the historical fog out of which the doctrine emerged,

the courts have experienced a great deal of confusion as to the theory and the time period for prescription, with consequent varying results.[35]

Historical Basis

In England prescription was based on a lost grant theory and was given credence by the statute of Westminister I which prohibits one from demanding under a writ of right the seisin of his ancestor of a longer time than Richard I (1189).[36] It is based on the fiction that a grant was made and lost by length of time.[37] Thus, the fictitious existence of a lost grant was presumed from long-continued use. Some courts in this country have said that prescription rests upon adverse user,[38] though there is some doubt as to whether there is a true common-law concept of prescription by adverse user.[39] The Hawaii Supreme Court, citing other jurisdictions has relied on the lost grant theory to find the creation of an easement by prescription[40] in the 1920 case of In re Title of Kioloku[41] and the 1944 case, Lalakea v. Hawaiian Irrigation Co.[42]

This faction of a lost grant has been repudicated by many courts and commentators.[43] Under the more modern theory, courts generally apply the statutes of limitations pertaining to corporeal interests in land to the prescription of easements (incorporeal interests). The courts have filled out the statutory gaps with judicial reasoning that closely parallels that used in adverse possession. In general, the requirement for prescription are identical to those of adverse possession, though the two theories differ from one another. Adverse possession is a corporeal interest in land which results in a change of title, and is based on possession, while a prescriptive interest is an incorporeal interest acquired by the manner of use.

With regard to private easements by prescription, the Hawaii Supreme Court in Tagami v. Meyer[44] followed the general rule[45] in setting out the elements for establishing an easement by prescription. The court stated that:

> ...the use and enjoyment must be adverse, under a claim of right, continuous and uninterrupted, open, notorious and exclusive, with the knowledge and the acquiescence of the owner of the servient tenement and must continue for the full prescriptive period.[46]

The prescriptive period in Hawaii, as set by law in 1973, is twenty years.[47] The Hawaii Supreme Court in Tanaka v. Mitsunaga recognized the principle of tacking whereby a person claiming a prescriptive right to an easement may tack on the periods of use by his predecessors to complete the prescriptive period[48] so long as there is privity between them.[49] The court found, however, that the evidence failed to establish continuous adverse use of the claimed easement for the prescriptive period.

Use is considered "open and notorious" if the real owners have actual knowledge or a reasonable opportunity to learn of its existence.[50] To be "open" the use must be without attempted concealment by the users. "Continuous and uninterrupted" means use not interrupted by the acts of the owner of the servient estate and no voluntary abandonment by the person(s) claiming the easement. Thus, the acts of the user must be of such a nature and with such frequency as to give the landowner reasonable notice that the user is claiming the easement against him.

The kinds of action by a landowner necessary to constitute an interruption of the use has been disputed

by the courts, and depends upon the nature of the right and the attendant circumstances.[51] One general rule is that there must be an actual physical interruption with an intent to interrupt. Mere verbal denials are usually insufficient to interrupt the right, though there is conflicting authority that verbal denials and protests are sufficient. Where the servient owner places gates or fences across the way that do not interfere with the enjoyment of the way, the user's right will normally not be defeated. But an interruption by any means which prevents the enjoyment of the way rebuts the presumption of the acquisition of a prescriptive easement.

Hawaii has followed the majority rule. In Swan v. Colburn the court ruled that the erection and maintenance of a gate by the landowner without evidence that he attempted thereby to exclude the tenants from the plaintiff's premises would not bar plaintiff's right to the way.[52] The evidence showed that the landowner closed the gate at night and only for the purpose of excluding wandering sailors and drunken persons.[53]

For the use to be "adverse" it must be against the owner's wishes and must be such as to indicate that the use is claimed as a right.[54] But what "adverse" really means has caused the courts confusion and controversy.[55] Courts have held that the use can be with the "acquiescence" but not with the "permission" of the owner. "Acquiescence" has been held to mean a passive assent or submission. The Hawaii Supreme Court in Tagami recognized the rule that no easement by prescription can be acquired where the use is by the express or implied permission of the owner.[56] In that case the court denied defendant's claim to an easement by prescription over plaintiff's property because the court found defendant's use of the road "permissive" since he paid money to the plaintiffs under an agreement with them for nine years as part of the consideration.

The Supreme Court of Hawaii[58] has adopted the prevailing rule that the part asserting a claim be an easement by prescription has the burden of proving all of the requisite elements.[59] However, where there has been an uninterrupted, continuous, and open use of a way for the prescriptive period, the courts will presume the use to have been adverse.[60] Courts disagree, though as to whether this presumption is conclusive or rebuttable.[61] Although this exact issue has not, apparently come before the Hawaii Supreme Court in prescription cases,[62] in adverse possession cases the court has held that the presumption of adversity may be rebutted.[63] In Albertina v. Kapiolani Estate the court held that the possession would be presumed to be hostile where, as in this case, the possession was unexplained either by a lease, contract or permission and was "shown to have been for the statutory period...actual, open, victorious, continuous and exclusive."[64] In the later decision of Territory v. Pai'a the court held that the evidence was sufficient to rebut the presumption of hostility.[65]

With regard to public easements by prescription, courts have disagreed on whether the general public can acquire a right of passage by prescription.[66] One line of authority requires that the easement can only be obtained by implied dedication, not by prescription.[67] Under the lost grant theory a grant presupposes a definite and certain grantee and the public is thought to be too indefinite a group to be a grantee.[68] Most courts, however, do apply the doctrine of prescription to public roads based either on common law or statute.[69] In Hawaii, the statutes governing public roads deal with dedication or surrender by the owner[70] rather than with prescription.

In the area of beach access, the New Hampshire Supreme Court has ruled that the general public has a right to acquire an easement by prescription.[71] In 1965 the court held in Elmer v. Rogers that the general

public had acquired a prescriptive right-of-way to a lake shore beach over private property.[72] Stating that the lost grant theory "is more or less in disrepute today,"[73] the court rejected the theory and its constraints. The court reasoned that prescriptive rights were no longer based on legal fictions but were now founded on statutes:

> The stabilization of long continued property uses has motivated the continued application of the doctrine of prescription based on the principles of statues of limitation which regulate the acquisition of land by adverse possession.[74]

The court further held that a private citizen, as a member of the public, had standing to assert a public right to access.[75]

The Texas Court of Civil Appeals in the 1964 case of Seaway v. Attorney General also recognized that the public could acquire a prescriptive easement based on peaceable, adverse, and continuous use of the beach for recreation and as a public way for pedestrian and vehicular travel.[76] The court did not consider the lack of a definite grantee a bar to the finding of an easement by prescription. Additionally, the court ruled that while use by the owners and by members of the public at the same time raises the presumption that the use by the public is permissive only, there may be sufficient evidence, as there as in this case, that the users were claiming under a right independent of any permission from the owners so as to establish the requisite adverseness.[77]

The issue as to whether public rights to easements can be acquired by prescription has not yet come before the Hawaii Supreme Court.[78] Because the court has not relied on the lost grant fiction in recent cases, there is no apparent reason for the court not to find that the public can acquire prescriptive rights to easements, assuming that the requisite elements of prescription as shown. Given the recent trend of the Hawaii Supreme Court to find in favor of the public in shoreline and water rights cases,[79] it seems likely that the court would follow the lead of New Hampshire to hold that the general public can acquire by prescription right-of-way to and along the shoreline.

FOOTNOTES:

1. See, e.g., Gion v. City of Santa Cruz, 2 Cal, 3d29, 465 p. 2d 50, 84 Cal. Rptr. 162 (1970). State ex.rel. Thorton v. Hay. 254 Ore. 584, 462 p. 2d 671 (1969); Seaway Co. v. Attorney Gen., 375 S.W. 2d 923; (Tex. Civ. App. 1964).
2. See, e.g., Barba v. Okuna, civ. no. 4590 (Hawaii 3rd Civ. 1980).
3. See text at notes _____, infra.
4. Town & Yuen, Public Access to Beaches: A Social Necessity, 10 HAWAII B.J. 5 (1973) (hereinafter cited as Town & Yuen).
5. Id. at 9.
6. Tom, Hawaiian Beach Access, 26 HASTINGS L.J. 823,830 (1975) (hereinafter cited as Tom); see J. Chinen, The Great Mahele 5 (1958).
7. Watson, Access Rights in Hawaii 33 (1972) (prepared for Alu Like) (hereinafter cited as Watson). (citing J. Wise "The History of Land Ownership in Hawaii," in Ancient Hawaiian Civilization 88 (1965); See also Palama v. Sheehan, 50 Hawaii 298, 300, 440 p. 2d 95, 97 (1968).
8. In re Boundaries of Pulehunui, 4 Hawaii 239, 245 (1879).
9. Tom, Supra note 6, at 834.
10. Id. In Rex v. Tin Ah Chin, 3 Hawaii 90 (1869), a criminal proceeding for murder in which the validity of a count in the indictment was challenged, the court stated, "our practice has leaned in favor of the common law of England, where the same does not conflict with the laws and customs of this Kingdom. Id. at 95. In Awa v. Hornor, 5 Hawaii 543 (1886), the question of whether a royal patent issued to two individuals created a tenancy in common or a joint tenancy was before the Hawaii Supreme Court. The English common law rule dictated that such a conveyance created a joint tenancy because of the feudal aversion to the division of an estate. The Hawaii Supreme Court rejected the English common law rule, asserting that the need for such a rule ceased with the Great Mahele. Id. at 544.
11. Act of Nov. 25, 1892, to Reorganize the Judiciary Department, (1892) Laws of Her Majesty Liliuokalani, Queen of the Hawaiian Islands, ch. LVII, Sec. 5, as amended, HRS Sec. 1-1 (1976).
12. See Tom, Supra note 6, at 835
13. Application of Ashford, 50 Hawaii 314, 315, 440 p. 2d 76,77 (1968)
14. 52 Hawaii 472, 479 p. 2d 202, (1970).
15. Id. at 425, 479 , p. 2d at 204.
16. Town and Yuen, supra note 4, at 7; 50 Hawaii 314, 316, 440 p. 2d. 76,77 (1968). Kamaaina witnesses were defined by the court as persons "specially taught and made repositories of this knowledge."
17. HAWAII RULE OF EVIL. 803(b)(20) (1980)
18. 50 Hawaii 314, 315, 440 p 2d. 76,77 (1968)
19. 50 Hawaii 298, 301, 440 p. 2d. 95, 97 (1968)
20. Town and Yuen, supra note 4, at 12.
21. HRS Sec. 1-1 (1976)
22. See Post v. Pearsall, 22 Wend. 425, 440-41. (N.Y. Ct. Err. 1839); Public Access to Beaches: Common Law Doctrines and Constitutional Challenges, 48 N.Y.U.L. REV. 469, 375 (1973).

23. Id.
24. Id. at 376.
25. 254 Ore. 584, 462 p. 2d at 671 (1969)
26. Id. at 588, 462 p. 2d at 673.
27. Id. at 597-99, 462 p. 2d at 677-78.
28. Id. at 595, 462 p. 2d at 677.
29. Id. 597-98, p. 2d at 677-78.
30. Id. at 595, 462 p. 2d at 676.
31. 48 N.Y.U.L. REV., supra note 22 at 376.
32. Id.
33. County of Hawaii v. Sotomura, 55 Hawaii 176, 181-82, 517 p. 2d 57 (1973).
34. 2 Thompson, Real Property 140-141, Sec. 335, Sec. 337 at 158. (1980); Town & Yuen, supra note 4, at 18.
35. Id. at 158-160, Sec. 337.
36. Id.; Sec. 335 at 140; see Town & Yuen, supra note at 19.
37. Id.
38. 2 Thompson, Real Property 162, Sec. 337 (1980).
39. Prescription is thought by some to also have been based on custom at common law before an statute of limitations or writs. It is founded on the presumption that he who has had a quiet and uninterrupted possesion for a long period of time has a just right. It is based, therefore, on presumed right as contrasted with adverse possession which is based on wrongful desseisin. This prescriptive right probably related to custom and not to private easements initially. Id. at 159-165.
40. Town & Yuen, supra note 4, at 19.
41. In re Title of Kioloku, 25 Hawaii 357, 366 (1920).
42. Lalakea v. Hawaiian Irrigation Co., 36 Hawaii 692, 706-707 (1944).
43. 2 Thompson, Real Property 162-167, Sec. 337 (1980); see Town & Yuen, supra note , at 20-21. Thompson has stated that "(t)he answer to the question of the essential elements of acquiring an easement by prescription turns upon the extent to which the jurisdiction equates prescription and adverse possession." Id. at 187, Sec. 340.
44. Tagami v. Meyer. 41 Hawaii 484 (1956).
45. See 2 Thompson, Real Property 189-200, Sec. 340 (1980).
46. Tagami v. Meyer, 41 Hawaii, 484, 487-488 (1956).
47. HRS Sec. 657-31 (1976). The period necessary to acquire an easement by prescription has varied in Hawaii. From 1856 until 1898 the prescriptive period was twenty years. L. 1890, c. 22, Sec. 1. In 1898 the prescriptive period was reduced to ten years, Am. L. 1898, c. 19, Sec. 1; and in 1973 the period was raised again to twenty years, Am. L. 1973, L. 26, Sec. 4.
Rights- of way by prescription were recognized during the earliest recorded periods of the Judiciary of the Hawaiian Kingdom. In Ro Ke v. Nicholson, 1 Hawaii 508, 517-518 (1856), for example, the Hawaii Supreme Court employed the doctrine of prescription to allow the plaintiff to enlarge his easement from a bridle path to a cart road. In order to do so, the court dispensed with the requirement of twenty years continuous use as a cart road and held that an uninterrupted use of the way from the time of the organization of the government in 1846 was sufficient to find a right of way by prescription.

The court agreed with the plaintiff's reasoning that to adopt the twenty year period required by the common law of England would be unreasonable because that length of time had not yet elapsed since landed property was divided and the titles to it clearly defined in the Kingdom of Hawaii. In justifying its deviation from England's twenty year rule the court stated that this rule had never been adopted in this country, either by custom or by legislature, and that Hawaii's new branch of jurisprudence should be founded "upon plain principles of equity and justice between man and man, rather than upon the stern rules of law established in older counties, many of which rules are wholly unsuitable to the present condition of our people." Id. at 518.

48. Tanaka v. Mitsunaga, 43 Hawaii 119, 125 (1959).

49. 2 Thompson, Real Property 246-247, Sec. 346 (1980).

50. Id. at 193-194, Sec. 340; Town & Yuen, supra note , at 20.

51. Id. at 249-253, Sec. 347.

52. Swan v. Colburn, 5 Hawaii 394, 396-397 (1885).

53. Id.

54. 2 Thompson, Real Property 200-203, Sec. 341 (1980); Town & Yuen, supra note 4, at 19-20.

55. 2 Thompson, Real Property 200-201, Sec. 341 (1980) Thompson has stated that under the lost grant fiction the user must be with the approval of the fee owner; but if prescription is considered analogous to adverse possession, the use must be against the fee holder's wishes. The Hawaii Supreme Court in Tagami, 41 Hawaii 484 (1956) and in Tanaka, 43 Hawaii 119 (1959) has equated prescription with adversion possession in terms of requisite elements. As to the element of adverseness, the court in Tanaka stated that "the adverse character of the use necessary to establish an easement by prescription is the same as that which is necessary to establish title by adverse possession." Id. at 125.

56. 41 Hawaii at 488.

57. Id.

58. See, e.g., 41 Hawaii at 487.

59. See 2 Thompson, Real Property 277, 281 Sec. 350 (1980); Town & Yuen, supra note 4, at 20.

60. Id. at 273-281; see Town & Yuen, Id.

61. Id.

62. However, in Lalakea v. Hawaiian Irrigation Co., 36 Hawaii 692 (1944), where the court granted defendant's claim to a prescriptive easement to convey water in a ditch over plaintiff's kuleana, the court placed the "burden to show that the use and occupancy of the kuleana was permissible and not hostile...upon the plaintiff." Id. at 708. Under the circumstances of the case the court found that the rule enunciated in Albertina 14 Haw 321, 325 applied because where, as here "one is shown to have been for the statutory period in actual, open, notorious, continuous and exclusive possession, apparently as owner, and such possession is unexplained, either by showing that it was under a lease from, or other contract with or otherwise by permission of the true owner, the presumption is that such possession was hostile. Being hostile, no notice of hostility was necessary other or in addition to the notice which occupancy and use afford."

63. Territory v. Pai'a 34 Hawaii 722, 726 (1938); Albertina v. Kapiolani Estate 14 Hawaii 321,325(1902).

64. 14 Hawaii at 325.

65. 34 Hawaii at 726.

66. 2 Thompson, Real Property 207-214, Sec. 342 (1980)

67. Id.

68. Id.

69. Id.

70. See, HRS Sec. 264-1 (1976 and Supp. 1980)

71. Elmer v. Rogers, 106 N.H. 512, 515 214 A. 2d 750, 752 (1965).

72. Id.

73. Id.

74. Id.

75. Id.

76. Seaway v. Attorney General, 375 S.W. 2d 923, 937-939 (Tex. Cir. App. 1964). The court also found in favor of the public on the basis of implied dedication. Id. at 930. It seems inherently contradictory, however, that the court uses the same set of facts and evidence to establish an implied dedication and to also find the use by the public "adverse to the owner" to support a finding of an easement by prescription.

77. Id. at 938.

78. In the 1977 federal court case of Jones v. Halekulani Hotel, however, the Ninth Circuit Court of Appeals affirmed the decision of the District Court that "the state of Hawaii had acquired an easement by prescription over the top of the seawall and thus had the sole duty to maintain the seawall." In that case a private citizen sued the Halekulani Hotel for breach of duty after he dove off a seawall on Halekulani Hotel property into shallow ocean water, thereby fracturing his neck. The Ninth Circuit affirmed the lower court's decision to grant the hotel's motion for summary judgment stating that the public's constant, uninterrupted, peaceful use of the seawall as a walkway from 1917 to 1972 was "sufficient to create an easement by prescription." The real basis of the holding, however, appears to be the implication by the court that the seawall had been surrendered by the hotel as evidenced by the hotel's noninterference with the public use of the seawall and the lack of countering affidavits from the hotel as to public use. The court stated that the Hawaii Supreme Court had previously characterized this type of seawall easement in Levy v. Kimball as a "public highway" under Hawaii Revised Statutes Sec. 264-1 (1968). That section provides that "public highways" include ways and trails and that "surrender of public highways shall be deemed to have taken place if no act of ownership by the owner....has been exercised for five years." Hawaii Rev. Stat. Sec. 264-1 (1970). Thus, the ownership issue of this case would have been more properly decided solely on the basis that Halekulani had surrendered the seawall to the State under Hawaii Revised Statutes Sec. 264-1 and under the Hawaii Supreme Court's interpretation of that statute in Levy v. Kimball.

79. See, e.g., In re Application of Sanborn 57 Hawaii 585, 562 P.2d 771 (1977); County of Hawaii v. Sotomura 55 Hawaii 176, 517 P.2d 57 (1973), cert. denied 419 U.S. 872 (1974); State v. Zimring, 52 Hawaii 16 472, 479 P.2d 202 (1970); Application of Ashford 50 Hawaii 314, 440 P.2d 76 (1968).

CHAPTER 3 MUNICIPAL LIABILITY IN FEDERAL COURT FOR CONSTITUTIONAL VIOLATIONS

CHAPTER 3 MUNICIPAL LIABILITY IN FEDERAL COURT FOR CONSTITUTIONAL VIOLATIONS

Introduction

Inherent in the establishment of a county beach access program is the likelihood that the county will become liable for violations arising out the U.S. Constitution and its laws, affording the litigants a day in the federal courts. Nearly every provision of the Constitution is a potential source for challenge against a beach access program. Without any actual ordinance or proposed plan to refer to, pinpointing the areas of constitutional vulnerability becomes difficult. However, an examination of past case law reveals those constitutional provisions that are most likely to arise in litigation. The county should bear these in mind upon planning a beach access program.

The memorandum is divided into two major sections. Part I, "Maintaining Actions in Federal Court," covers the two important jurisdictional statutes that give federal courts the power to hear constitutional claims, and goes on to explain certain Eleventh Amendment and abstention doctrine restrictions on bringing actions in federal courts. Part II, "Constitutional Provisions Likely to be Litigated," covers those specific provisions that will be of the highest concern: The Fifth Amendment Taking Issue, Fourteenth Amendment Substantive Due Process, Fourteenth Amendment Procedural Due Process, and Fourteenth Amendment Equal Protection Clause. Due to its importance, special emphasis is placed on the Fifth Amendment Taking Issue and its applicability to land use regulations.

Part I - Maintaining Actions in Federal Courts

A. 28 U.S.C. 1331 and the Bivens Approach

28 U.S.C. 1331 is the Federal Question Jurisdiction statute that confers original jurisdiction in federal district courts if: 1) the controversy arises under the Constitution, law or treaties of the U.S., and 2) the matter in controversy exceeds $10,000.

While this statute confers jurisdiction, as a general rule an action may not be maintained for which there is no statutory provision authorizing a remedy or relief to be granted. However, In Bivens v. Six Unknown Agents, 403 U.S. 388 (1971), the Court held that a valid cause of action against federal agents who violated the plaintiff's Fourth Amendment rights protecting persons from unreasonable searches and seizures, existed within the Fourth Amendment. Monetary relief was held to be the proper form of redress.

While the Supreme Court has not ruled on its validity, several district courts have extended the Bivens rationale, i.e., that a valid cause of action may arise directly from a Constitutional provision affording the litigant a remedy despite the absence of a federal statute authorizing such, to Fourteenth Amendment claims. The Nineth Circuit Court has recognized that municipalities may be held liable for civil rights violations directly under the Fourteenth Amendment by applying the Bivens approach. See, e.g., Gray v. Union County Intermediate Educ. Dist., 520 F.2d 803 (9th Cir 1975).

B. 42 U.S.C. 1983

42 U.S.C. 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usgage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United State or other person within the jurisdiction thereof to

> the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

This statute, providing an express right of action, has been used together with 28 U.S.C. 1343 (3) which is the federal court jurisdiction provision. Litigants have used these provisions to take municipal and state employees to federal court for civil rights violations. Recently, the Supreme Court in addition to providing a cause of action for Constitutional violations, held that Sec. 1983 also provides a cause of action for violations of federal statutes, Main v. Thibout, 100 S. Ct. 2502 (1980).

While Sec. 1983 actions have always been maintained against municipal employees, in Monroe v. Pape, 365 U.S. 167 (1961), the Court stated that municipalities are not "persons" within the meaning of Sec. 1983, in effect granting local governments absolute immunity from Sec. 1983 liability. In order to circumvent this rule in Monroe, supra, litigants have brought actions under Sec. 1331/Bivens and unsuccessfully under various other approaches. See Moor v. County of Alameda, 411 U.S. 693 (1973); City of Kenosha v. Bruno, 412 U.S. 507 (1973); and Aldinger v. Howard, 427 U.S. 1 (1976).

After sixteen years of the municipal immunity rule established in Monroe, supra, the Supreme Court in Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658 (1978), reversed, holding that municipalities do not enjoy absolute immunity from Sec. 1983 liability, as they are "persons" within the statute. Henceforth, municipalities were to be liable for Sec. 1983 constitutional violations occasioned either by, 1) the implementation of "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," or by 2) the adherence to a governmental "custom" even though such custom did not receive official approval. Monell, supra at 691.

The Court, addressing the issue of the applicability of the doctrine of respondeat superior, explicitly stated that a municipality would not be vicariously liable under Sec. 1983. The Court reasoned that by employing the words "subject" and "causes to be subjected" in Sec. 1983, Congress had injected into the statue the element of causation. Under the doctrine of respondeat superior, liability attaches in the complete absense of culpability. See generally PROSSER, HORNBOOK OF THE LAW OF TORTS Sec. 69 (4th ed. 1971).

Some of the courts which have applied the Sec. 1331/Bivens rationale to Fourteenth Amendment violations have also held municipalities vicariously liable under the doctrine or respondeat superior. See e.g. Culp v. Devlin, 441 F. Supp. 120 (E.D. Pa. 1977); Collum v. Yardovitch, 409 F. Supp. 557 (N.D. Ill. 1975). It would appear that the only possible use the direct Fourteenth Amendment action could serve after Monell would be as a vehicle for circumventing the Monell rule against the use of the doctrine of respondeat superior. However, this tactic has been attempted unsuccessfully in this federal circuit. See Molina v. Richardson, 578 F.2d 846 (9th Cir. 1978), cert denied 439 U.S. 1048 (1978).

The concept of "good faith" immunity has been recognized in suits against state and municipal officials, protecting them from liability under Sec. 1983 actions. Wood v Strickland, 420 U.S. 308 (1974); Schener v. Rhodes, 416 U.S. 232 (1974). The immunity standard

requires that an individual defendant has acted in both objective and subjective good faith. Therefore, a defendant is cloaked with immunity if he had no knowledge or was not expected to have knowledge that his actions infringed on a Constitutional right or norm, and if he acted without malice or intent to cause Constitutional deprivation or injury. Procunier v. Navarette, 434 U.S. 555 at 562 (1978). Since Monell, supra, has held that municipalities are "persons" under Sec. 1983, several Circuit Courts have attempted to extend the good faith immunity to local governments. See Sala v. County of Suffolk, 604 F.2d 207 (2d Cir. 1979), vacated, 48 U.S.L.W.4389 (1980); Owen v. City of Independance, 589 F.2d 335 (8th Cir. 1979), rev'd, 48 U.S.L.W. 4389 (1980); Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980) (en banc).

This issue of the applicability of the good faith immunity to local governments was settled by the Supreme Court who reviewed the 8th Circuit case of Owen v. City of Independance, supra. The Court held that the doctrine of good faith immunity afforded to government officials did not extend to government bodies, based on common law practices and policy consideration.

One final aspect of Sec. 1983 actions is the question of its applicability to states. In Quern v. Jordan, 440 U.S. 332 (1979), the Court held that states are not "persons" within the meaning of Sec. 1983. The exclusion of states from Sec. 1983 liability is important when read with the Monell qualification that its holding was "limited to local government units which are not considered part of the State for Eleventh Amendment purposes." Monell, supra at 690. The possible effects of Eleventh Amendment immunity on local governments is discussed in the following section.

C. Eleventh Amendment Limitations

The Eleventh Amendment of the Constitution says that:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State."

Although not explicit in its language, the Eleventh Amendment has been held to bar suits against a state in federal courts by its own citizens. Hans v. Louisiana, 134 U.S. 1 (1890). However, in Eldeman v. Jordan, 415 U.S. 651 (1974), the Supreme Court recognized the well-established rule that unlike the state itself, municipalities and other political subdivisions are not immune from suit under the Eleventh Amendment. This rule was reaffirmed for Sec. 1983 actions against municipalities under Monell, supra. However, the Court in Monell, supra, conceded that there are situations where a local government unit may be considered a state for Eleventh Amendment purposes, cloaking the unit with immunity from suit in federal courts. Monell, supra at 690.

Courts have considered the question of whether or not a state has delegated its immunity largely in terms of whether the governmental unit excercising power can be viewed as an "alter ego" or "arm" of the state, or whether the unit is more like a municipal corporation or independant political subdivision. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 at 280 (1977). In essence, the question is whether the state is a "real party in interest." See In re Ayers, 123 U.S. 443 (1887); Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir. 1975).

Federal courts have looked at a number of factors in determining the legal status of government entities, i.e., whether the factors are sufficient to afford the entity state status and its Eleventh Amendment immunity. The analysis always begins with a review of the applicable state law to determine what characteristics, powers, and relationships exist which determine whether the suit is in reality against the state itself. Hander, supra at 279. Courts in different Circuits have focused on different factors depending on the particular facts of each case and applicable state law. However, the analysis of the State law in every case should start off with the examination of the factors that the U.S. supreme Court has found to be important.

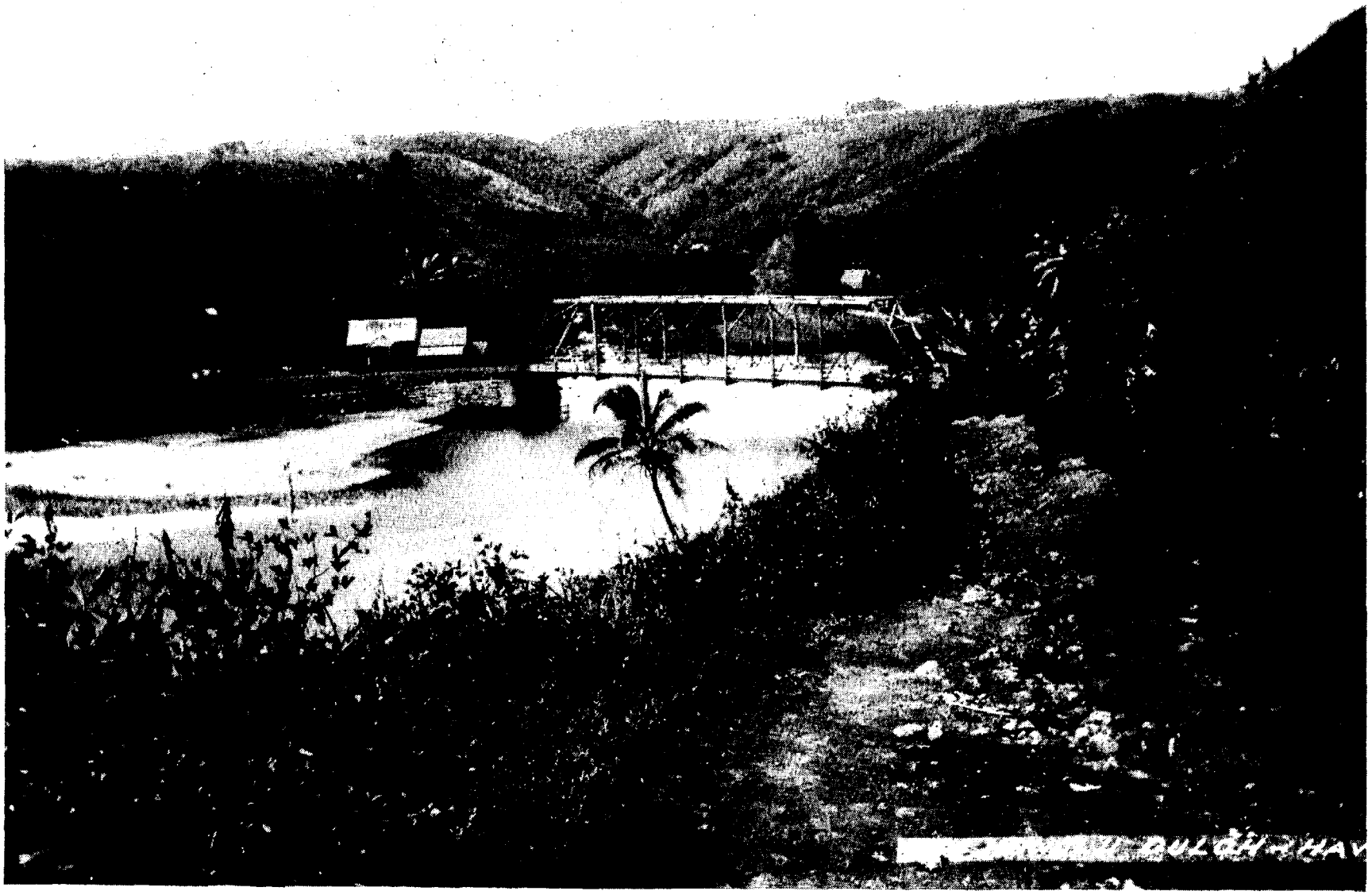
In Mt. Healthy, supra, the Supreme Court considered whether an Ohio school district was to be treated as an arm of the state partaking the state's Eleventh Amendment immunity. The Court considered the following factors under Ohio law: 1) Ohio school boards were subject to guidance from the State Board of Education, 2) school boards received a significant amount of money from the state, 3) the term "state" did not include "political subdivision" and school districts were included in the term "political subdivision", and 4) local school boards had extensive powers to issue bonds and levy taxes. On balance the court concluded that an Ohio school board was not an arm of the state entitled to share its immunity.

Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), was the Supreme Court ruling on the Ninth Circuit case Jacobsen v. Tahoe Regional Planning Agency, 566 F.2d 1353 (1977), in which the Court considered whether the California-Nevada bi-state Tahoe Regional Planning Agency (TRPA) was protected by the Eleventh Amendment. The TRPA, a major regional planning agency formed by interstate compact to protect the Lake Tahoe area, enacted an ordinance that substantially restricted that market value of a tract of property by reclassifying it from residential to "general forest" and "recreation" uses. Property owners brought suit for damages under Sec. 1983. The Supreme Court took the case on certiorari to decide the Eleventh Amendment issue, holding that California and Nevada had not delegated Eleventh Amendment immunity to the TRPA, which was only exercising a "slide of state power." Jacobsen, supra at 1359.

The Court focused on the following factors: 1) TRPA was described as a "separate legal entity" and a "political subdivision," 2) six of the ten governing members of the Agency were appointed by cities and counties, 3) funding under the compact was to be provided by the counties with state treasuries absolved of liability for TRPA obligations, and 4) while TRPA was originally created by the States, its authority to make rules in its jurisdiction was not subject to veto at the state level.

The principles established by the Supreme Court for testing delegation of immunity have been applied by lower federal courts to a variety of government agencies, universities, school districts, state review boards, social service agencies, etc. See e.g., Carey v. Quern, 588 F.2d 230 (7th Cir. 1978); Mackey v. Stanton, 586 F.2d 1127 (7th Cir. 1978), cert. denied, 100 S. Ct. 172 (1979); Hander v. San Jacinto, supra; Savage v. Pennsylvania, 475 F. Supp. 524 (E.D. Pa. 1979), aff'd, 620 F.2d 289 (3d Cir. 1980); Holley v. Lavine, 605 F.2d 638 (2d Cir. 1979), cert. denied, 446 U.S. 913 (1980).

The federal courts have focused on several factors to determine whether a state has delegated its Eleventh Amendment immunity to its component entities. A review of the case law seems to indicate that the courts have placed emphasis on three general factors: 1) a clearly



articulated state policy, 2) retention by the state of the power to administer and enforce that policy, and 3) assumption of financial liability by the state. The greater the state maintains responsibility and control over the entity, the more likely the courts will find the entity to be an arm of the state, entitled to immunity from suit in federal court.

The County of Hawaii should keep these factors in mind when establishing a beach access program. The county participation in a statewide access program may serve to immunize the county from claims in federal courts. However, this may necessarily mean trading off some of the flexibility that would accompany a more closely drawn, exclusive county plan. As a final note, the California Coastal Act of 1976, CAL. PUB. RES. CODE Sections 30000-30900 (West 1977), may be referred to as a comprehensive statewide coastal zone management program that would probably meet the standards entitling concerned local governments to claim a share of the state's Eleventh Amendment immunity. See 8 HASTINGS CONST. L.Q. 453 (1981).

D. Abstention Doctrine

Federal courts may decline to hear Sec. 1983 civil rights claims based on the Federal Abstention Doctrine. The reason lies in principles of judicial restraint that limit federal court intervention in matters of state and local competence, such as land use regulation. Since land use planning zoning regulations address problems that concern the state or municipality for which they are enacted, federal courts can apply the abstention doctrine to decline jurisdiction over land use litigation. Abstention is usually exercised when a state law decision might avoid the necessity to consider a federal question. See 8 HASTINGS CONST. L.Q. 491 (1981).

While the Supreme Court has not yet considered the federal abstention doctrine in land use cases, several lower federal courts, including the Ninth Circuit, have applied the doctrine. In Sederquist v. City of Tiburon, 590 F.2d 278 (9th Cir. 1978) the plaintiff challenged the city's temporary development moratorium as a taking for which just compensation was required under the Fifth Amendment. The court invoked the federal abstention doctrine, recognizing that land use regulation is a sensitive area of state and local policy. Quoting from an earlier Ninth Circuit case, the court state that,"(f)ederal courts must be wary of intervention that will stifle innovative state efforts to find solutions to complex social problems." Sederquist, supra at 282. The court also reasoned that a state court determination of applicable state law might render the federal constitutional issue moot.

PART II - Constitutional Provisions Likely to be Litigated

A. Fifth Amendment Taking Clause

The Fifth Amendment of the United States Constitution states in part: "nor shall private property be taken for public use, without just compensation." The amendment provides for just compensation as a remedy. This means that actions may be maintained in federal courts without reliance on Sec. 1983 as a claim of relief provision, assuming that jurisdiction can be established. (Jurisdiction will most likely be established under the Federal Question Jurisdiction of the District Courts, 28 U.S.C. 1331). In effect Sec. 1983 provides a statutory damage action that parallels the condemnation remedy for unconstitutional and land use takings.

As a beach access program will undoubtedly involve the acquisition of some private land, the possibility of challenges under the Fifth Amendment deserves great consideration. On its face the meaning of the Amendment appears clear - the government cannot take private property unless the taking is for a public purpose and just compensation is awarded. However, both legal and practical problems cloud the issue. As a legal problem, one must first confront the threshold question as to what actions constitute a "taking." Once the action is deemed to be a taking, the questions as to whether it is for a "public purpose" and whether the compensation is "just" arise. The fact that compensation is mandatory, along with an attendant administrative or legal fees, draws attention to the greatest practical problem of condemning land for beach access purposes, the ability to secure adequate funding. While the gravity of the funding problem cannot be over emphasized, a discussion of it is beyond the scope of his memorandum. The following is a discussion of the legal issues surrounding the Fifth Amendment.

First, the threshold question of whether the action is a "taking" must be answered. The typical taking occurs when a government entity formally condemns private land and obtains the fee simple pursuant to its sovereign power of eminent domain; the judicial or administrative body enters a decree of condemnation and just compensation is awarded. See Berman v Parker, 348 U.S. 26 (1954). Acquisition of an easement interest in property by the government is also a taking. See United States v. Causby, 328 U.S. 256 (1946). Government actions that may be characterized as physical acquisitions or occupation of private resources to permit or facilitate uniquely public functions have thus been characterized as takings.

However, it is widely accepted that a taking may not only arise by the institution of condemnation proceedings, but that they may also arise in actions for inverse condemnation, where the landowner institutes the action against the government. Pumpley v. Green Bay, 80 U.S. (13 Wall.) 166 (1871). Typically, in an inverse condemnation suit the government will engage in some action pursuant to a public purpose by which the landowner's property is physically damaged. The landowner will then bring an action in which the court may assess against the government the compensation the landowner should have been entitled to had the government brought eminent domain proceedings. In service of this principle, the Court has frequently found taking outside the context of formal condemnation proceedings or tranfer of fee simple, in cases where government action benefiting the public results in destruction of the use and enjoyment of private property. E.g., Kaiser Aetna v. United States, 444 U.S. 164 (1979) (navigational servitude allowing public right of access); United States v. Dickinson, 331 U.S. 745 (1947) (property flooded because of government dam project); United States v. Causby, supra (frequent low level flights of military aircraft over private property).

To further pass constitutional muster, the taking must also be for a "public use". The Supreme Court in Berman v.Parker, supra, clarified "public use" to mean "public purpose." Public purposes are those that are substantially related to the advancement of public health, safety, morals, or general welfare. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 at 395 (1926). The reasonable regulation of acts pursuant to these purposes are valid exercises of a state's police power. Land use regulations for recreational purposes, which would seem to encompass a beach access program, have been held to be valid exercises of police power as they promote the general welfare. Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673 (1966).

Once a taking for a public use has been established, the constitution demands that the landowner be afforded just compensation. The Fifth Amendment does not embody any specific procedure or form of remedy, rather it "expresses a principle of fairness". United States v. Dickinson, supra at 748. Therefore, courts are free to experiment in the implementation of this rule, provided the chosen procedures and remedies are fundamentally just. As a general rule the remedy of monetary reflief or damages is awarded for physical acquisition or damages.

Regulatory Takings

While it is clear that takings involving formal condemnation proceedings, occupations, and physical invasions demand compensation, the Supreme Court has yet to clearly rule on the compensability of de facto takings of property, or "regulatory takings." Regulatory takings typically arise where despite the lack of any physical appropriation or damages to the property, government regulations have substantially restricted the uses to which the property may be put, and consequently have substantially reduced its value. States are permitted to reasonably regulate the health, safety, morals and general welfare of its citizens pursuant to their inherent police powers, without paying compensation. Village of Euclid, supra. States must however compensate land owners for takings of private property pursuant to their inherent powers of imminent domain. (Fifth Amendment). The important issue that remains to be resolved is whether the government's exercise of its regulatory police powers can ever amount to a Fifth Amendment taking. Assuming that regulatory takings demand compensation, courts have been further plagued by the need to fashion a proper remedy - injunctive or monetary. The issue of whether the regulatory taking is for a public purpose has posed less of a problem.

An understanding of the law in the area of regulatory takings is an important aspect of the taking issue for the County to take in consideration. A Beach Access Program will undoubtedly involve land use regulation (zoning, moratoriums, exactions, use restrictions, etc.) Outside of actual physical appropriations, the County must be alerted to the possibility that they be held liable to compensate land owners if land use regulations are beyond reasonable limits, amounting to regulatory takings. The analysis starts off with ascertaining whether regulatory takings are Fifth Amendment takings, and fashioning a proper remedy (ie., deciding what compensation is "just"). These questions will be discussed under the framework of the recent Supreme Court decision, San Diego Gas & Electric Company v. City of San Diego, 49 U.S.L.W. 4317 (March 1981), which was an attempt to resolve the issue of "regulatory takings".

The specific issue presented to the Court in San Diego, supra, was whether a "state must provide a monetary remedy to a landowner whose property allegedly has been 'taken' by a regulatory ordinance claimed to violate the Just Compensation Clause of the Fifth Amendment." San Diego, supra at 4317. Unfortunately , the Court in its main opinion failed to address the issue leaving it undecided, due to a finding of lack of jurisdiction. The Court decision was split 5 to 4, with Justice Rehnquist joining with the majority but also filing a concurring opinion. Although Justice Rehnquist agreed that the case be dismissed on jurisdictional grounds, he also state that but for the jurisdictional problem, he "would have little difficulty in agreeing with must of what (was) said in the dissenting opinion of Justice Brennan." San Diego, supra at 4320.

In the dissently opinion Justice Brennan opined that

the Court had properly taken jurisdiction and thus went on to discuss the merits, proposing the rule that would recognize regulatory takings as takings under the Fifth Amendment, for which monetary relief should be afforded. The fact that gives Justice Brennan's dissently opinion major importance is that his conclusions on the merits were supported by the three justices who concurred in his opinion and by Justice Rehnquist who concurred with the majority only on the jurisdiction issue. It therefore appears that Justice Brennan's conclusions on the compensation issue may have the support of a majority of the Court.

The case arose out of an action for damages in inverse condemnation, as well as mandamus and declaratory relief brought by the plaintiff landowner against the defendant city. The Plaintiff alleged that the city had deprived it of the beneficial use of its property through the rezoning and adoption of an open-space plan. The plaintiff alleged that he was now unable to use the land purchased for the purpose of constructing a nuclear power plant, which would have been allowable under the previous industrial zoning status.

The trial court found that the deprivation of use of the plaintiff's land entitled it to monetary damages for the fee simple value of the property. The judgment was affirmed by the intermediate appellate court. However, the appellate court judgment was vacated by the California Supreme Court, and the case was retransferred to that court for reconsideration in light of the intervening holding in Agins v. City of Tiburon, 24 Cal. 3d 366, 598 P.2d 25, aff'd on other grounds, 447 U.S. 255 (1980).

In Agins, supra, the California Supreme Court held that an owner deprived of the beneficial use of his land by a zoning regulation is not entitled to damages in inverse condemnation but that his exclusive remedy is invalidation of the regulation in an action for mandamus or declaratory relief. The court, in other words limited the remedy available to a landowner who claimed that a zoning regulation amounted to a taking. However, the court did not hold that the same injunctive remedy limitation also applied to actual regulatory takings, as it found the facts of the case insufficient to constitute a taking. It did not hold that regulatory zoning could never amount to a taking. Id., 24 Cal.3d at 272, 598 P.2d at 98. The U.S. Supreme Court affirmed, leaving the issue of whether land use regulation could ever amount to a taking requiring just compensation undecided.

In light of Agins, supra, the intermediate appellate court reversed the trial court's judgment, holding that appellant could not recover compensation through inverse condemnation and that, because the record presented factual disputes not covered by the trial court, mandamus and declaratory relief would be available if plaintiff desired to retry the case. The California Supreme Court denied further hearing, and the Gas and Electric Company appealed to the U.S. Supreme Court.

As mentioned earlier, the majority dismissed the case on the ground of lack of jurisdiction, 28 U.S.C. 1257 granting the Court limited jurisdiction to review only "(f)inal judgments and decrees rendered by the highest Court of a State in which a decision could be had." Basically, the Court held that there was no "final judgement," as the intermediate appellate court on remand by the California Supreme Court, had found that certain factual disputes were yet undecided.

Nevertheless, the dissenting opinion by Justice Brennan went on to discuss the case on its merits. First of all, Justice Brennan established that a government's

exercise of its regulatory police power can amount to a Fifth Amendment taking. The principle has its source in Justice Holmes' opinion in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), in which he stated; "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Id. at 415. Unfortunately, the Court in Pennsylvania Coal, supra, and in subsequent land use cases has failed to clarify an exact standard as to when a particular regulation "goes too far".

In Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) the Court identified several factors that have particular significance when examining the taking question - such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action. Id. at 124. Penn Central, supra seems to indicate that de facto regulatory taking will not be found where the landowner retains "reasonable beneficial use" of the property, (Id. at 138) and he is not "solely burdened and unbenefited " by the regulation. Id. at 134.

Justice Brennan argues that there is an essential similarity between regulatory takings and other takings. "Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property." San Diego , supra at 4325 (Brennan, J., dissenting). "It is only logical then, that government action other than acquisition of title, occupancy, or physical invasion can be a "taking", and therefore a de facto exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of this interest in the property. Id.

Having established that property may be "taken for public use" by police power regulation within the meaning of the Just Compensation Clause of the Fifth Amendment, Justice Brennan went on to discuss whether the government could constitutionaly limit the landowner's remedy to invalidation of the regulation, instead of awarding monetary compensation as is afforded in other taking cases.

Courts that have held land use restrictions unconstitutional usually provide relief by injunction as the appropriate judicial remedy. See Agins, supra. The remedy of monetary compensation is not afforded as courts have been reluctant to extend the Fifth Amendment guarantees to include "regulatory takings." Since no constitutional taking occurs, the monetary remedies afforded through condemnation and inverse condemnation actions are denied.

In a typical action, a landowner in land use litigation will challenge the constitutionality of the regulation as it applies to his particular property (not a facial attack on the regulation), and if successful is granted an injunction setting aside the land use restriction as unconstitutional as applied to the particular property. See 8 HASTINGS CONST. L.Q. 517 (1981). While in this typical action no taking violation is found, the unconstitutionality is based on a Fourteenth Amendment violation of substantive due process. The constitutional challenge is almost always based on both the Fourteenth Amendment's due process clause and the Fifth Amendment taking clause. (See next section on Fourteenth Amendment Substantive Due Process). Courts do not provide an alternative remedy based on the taking clause by awarding compensation to the landowner for an unconstitutional land use restriction. See e.g., Allen v. City & County

of Honolulu, 58 Haw 432, 571 P.2d 328 (1977); Fred F. French Investing Co. v. City of New York, 39 N.Y. 2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, appeal dismissed, 429 U.S. 920 (1976).

However, Justice Brennan goes on to asset that once there is a taking, just compensation is automatically required. Due to the equitable nature of the just compensation requirement, mere invalidation of a regulation may not be constitutionaly sufficient where the landowner has suffered economic loss. San Diego, supra, at 4326 (Brennan, J., dissenting). But, the losses sustained by land use regulation are often temporary in nature, due to the possibility that the regulation may be rescinded or amended. This is in contrast to most traditional taking cases where condemnation or property damages result in a permanent taking of the land.

Justice Brennan downplays the distinctions between temporary and permanent takings by stating: "Nothing in the Just Compensation Clause suggests that 'takings' must be permanent or irrevocable." San Diego, supra, at 4326 (Brennan, J., Dissenting). Cases also exist where although the government has taken temporary use of property through its powers of eminent domain, the Court has not hesitated to determine an appropriate measure of monetary compensation. See Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. Petty Motor Co., 327 U.S. 372 (1946).

Briefly stated, Justice Brennan concludes by proposing a constitutional rule that:

> "(O)nce a court finds that a police power regulation has effected a 'taking', the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation. Ordinary principles determining the proper measure of just compensation, regularly applied in cases of permanent and temporary 'takings' involving formal condemnation proceedings, occupations, and physical invasions, should provide guidance to the courts in the award of compensation for a regulatory 'taking.' As a starting point the value of the property taken may be ascertained as of the date of the 'taking.' Alternatively the government may choose formally to condemn the property, or otherwise continue the offending regulation: in either case the action must be sustained by proper measures of just compensation." San Diego, supra at 4327 (Brennan, J., dissenting).

Commenters have pointed out that it should be made clear that courts may also terminate a "temporary" regulatory taking by declaring the regulation invalid, and that formal action by the governing body to "rescind" or "amend" is not required. 8 HASTINGS CONST.L.Q. 535 (1981). A landowner would thus be able to both invalidate a harsh land use regulation as a de facto taking and to recover compensation for losses caused by the regulation while it was in force in a direct Fifth and Fourteenth Amendment action.

Federal and state courts will probably accept Justice Brennan's views, as stated in San Diego, to be the best evidence of the Supreme Court's current interpretation of the Fifth and Fourteenth Amendments as applied to regulatory taking cases. The degree of deprivation necessary to amount to a regulatory taking and the development of formulas to appropriate the amount of just compensation will need to be worked out on a case-by-case basis.

Justice Brennan's solution appears to be a compromise between those advocates who assert that a "regulatory taking" can never amount to a taking (ie. the proper remedy is not in inverse condemnation but injunctive relief), and those who assert the view that regulatory takings may be treated like traditional takings (ie. the remedy is in inverse condemnation, based on the fee value of the property permanently taken). The inequities of rendering an injured landowner unable to obtain monetary compensation are removed, but only removed until the temporary injury abates through invalidation of the harsh regulation.

For the county or government unit pressed monetarily, this will have a chilling effect on the implementation of strict or innovative planning measures. However, the effect would be less chilling than if compensation was awarded on the bases if a permanent taking. The effect is that local government decision-makers must more seriously consider the economic impact of proposed land use regulations on landowners, allowing for the possibility that courts may demand temporary monetary compensation to aggrieved landowners.

B. Fourteenth Amendment Substantive Due Process

The Fourteenth Amendment states in part that: "nor shall any State deprive any person of life, liberty, or property, without the due process of law."

Chronic confusion has resulted in judicial language where landowners challenge the constitutionality of regulations based on the Fourteenth Amendment, which encompasses both the Due Process Clause and the incorporation of the Fifth Amendment Taking Clause as applied to the States. In other words, under the rubric of the "Fourteenth Amendment," courts have invalidated regulations on grounds of substantive due process without finding that they amount to a de facto taking. Usually the challenger asserts both that the land use regulation is "arbitrary," or "capricious," and/or "unreasonable," and that it is so restrictive as to amount to a de facto taking. E.g., Nectow v. City of Cambridge, 227 U.S. 183 (1928). However, an action to invalidate a regulation may be maintained exclusively on a due process argument.

A court may find that a regulation has deprived a landowner of property without substantive due process, although the regulations are only moderately restrictive, if, 1) the purpose of the regulations is found to be improper - ie., the purpose is not to protect public health, safety, morals or welfare -, or 2) the means chosen to effect a proper purpose are not rationally related to the ends sought to be achieved. Katobimar Realty Co. v. Webster, 20 N.J. 114, 118 A.2d 824 (1955). In such cases, courts tend to say that the regulations are invalid because they are "arbitrary," "capricious," "unreasonable" and/or "not substantially related to the public health, safety or welfare."

C. Fourteenth Amendment Procedural Due Process

The requirements of procedural due process demand that whenever the government deprives a person of his property, he is entitled to notice and a meaningful hearing before the fact. Fuentes v. Shevin, 407 U.S. 67 (1972); Sotomura v. County of Hawaii, 460 F.Supp.473 (1978). "(W)hen a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property can be prevented. It has long been recognized that 'fairness can rarely be obtained by secret, one-sided determination facts decisive of right..." Fuentes, supra at 81.

The requirement of a meaningful hearing before the deprivaton of property rights illustrates the importance attached to the concept that an individual has a right to own and freely use and control property. A formal condemnation hearing is a procedural means used to protect the landowner from unconstitutional deprivations and also to justify the governments taking. A government entity must be sure that a landowner is afforded proper procedural due procedural due process before the taking of property.

The usual judicial remedy for a procedural due process violation is remand to the decisionmaking agency for new proceedings in accordance with due process dictates. 8 HASTINGS CONST. L.Q. (1981). In Carey v. Piphus, 435 U.S. 247 (1978), plaintiff students were deprived of procedural due process when suspended from school. They sought monetary relief for mental and emotional distress under Sec. 1983. The Supreme Court denied the monetary relief, noting the difficulty in proving actual mental and emotional distress. When the only constitutional violation is procedural, Carey, supra, indicates that the procedural violation does not warrant a monetary damage award when no actual damage is shown.

D. Fourteenth Amendment Equal Protection

The Fourteenth Amendment states in part that; "nor shall any State...deny to any person within its jurisdiction the equal protection of the laws."

As demands for beach access increase, rendering municipal beaches more and more crowded and unmanageable, can a city or county restrict access to its citizens only? While the U.S. Supreme Court has not addressed such a narrow issue, in Brindley v. Lavallette, 33 N.J. Super. 344, 110 A.2d 157 (1954), the New Jersey Superior Court held that a city ordinance that excluded non-residents from municipal beaches was in violation of the Equal Protection Clause. This decision was later approved by the New Jersey Supreme Court in Neptune City v. Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972). In those two cases the beaches were public by virtue of dedication or the public trust doctrine.

However, New Jersey courts have distinguished cases where the city beaches were not acquired by dedication or the public trust doctrine, allowing the exclusion of non-residents (Van Ness v. Deal, 139 N.J. Super. 83, 352 A.2d 599 (Low Div. 1975), rev'd on other grounds, 145 N.J. Super 368, 367 A.2d 1191 (App. Div. 1976), and the charging of higher non-resident fees (Hyland v. Allenhurst, 148 N.J. Super. 437, 372 A.2d 1133 (1977)). The distinction recognizes the fact that when cities act in their local or private capacities, it is for the health, safety, and welfare of their own residents. The fact that a beach may have a limited capacity and that its maintenance is through local taxes and bonds, may justify placing a heavier burden on non-residents. Those two cases are currently on appeal to the New Jersey Supreme Court.

Absent any justifying special circumstances it appears that courts will deny a municipality the right to exclude non-residents or charge them higher user fees under the Equal Protection Clause. Further, in a state like Hawaii where the beaches are a major drawing card for the vital tourist industry, policy considerations demand a similar result.

CHAPTER 4 TORT LIABILITY UNDER A COUNTY BEACH ACCESS PROGRAM IN HAWAII

The determination of the county's liability for violations of tort laws must be considered prior to the acquisition of legal control or jurisdiction over any lands under a County Beach Access Program. Recreation areas, often rugged and remote, are fraught with potential injury causes arising most probably from, but not limited to, nonfeasance or negligence of county employees. In examining county liability the historical development of liability and immunities will be traced from its common law applications to the development of case law in Hawaii.

The question of the liability of public corporations, such as cities, towns and counties, for various classes of torts is one upon which there is a wide divergence of opinion. The general doctrine of liability for torts is based upon the common law rule that affords redress for wrongs suffered by individuals. Governmental immunity from tort liability has its origins in the common law doctrine of sovereign immunity under which it was postulated that, "The King can do no wrong." However, more recently courts and legal scholars have been critical of the attachment of such devine immunity to the throne or government. Justice Holmes state in Kawananakoa v. Polybank, 205 U.S. 349 at 353 (1907), sustaining a Hawaii Territorial Supreme Court decision, "A sovereign is exempt from suit, not because of any formal conception of obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

It is settled that the United States and the various state governments cannot be sued without their consent. The principle of governmental responsibility for governmental tortious acts was accepted by Congress with the passage of the Federal Tort Claims Act in 1946. 28 U.S. C. Sec. 2671 et seq. (1976). The Hawaii State Tort Liability Act, derived in substance from the Federal Torts Claims Act, was enacted in 1957. H.R.S. Sec.662 (1976).

Applicability of H.R.S. Section 662 to County Governments

The application of H.R.S. Sec. 662 provisions to the county governments has been upheld in a limited and confusing manner. A discussion of the development of relevant case and statutory law follows.

Under H.R.S. Sec. 662-4, Statute of Limitations, a tort claim against the state must be brought within two years. However, under H.R.S. Sec. 46-72 tort claims against the counties must be brought within six months.

The Hawaii Supreme Court in Salavea v. City & County of Honolulu, 55 Haw. 217 (1973), considered the applicability of H.R.S. Sec. 662-4 to a tort action against the City & County of Honolulu. The court held that the provisions of H.R.S. Sec. 46-72 being inconsistent with Sec. 662-4, were invalid; and therefore Sec. 662-4 being the applicable statute of limitations, superceded Sec. 46-72. Salavea, supra, was subsequently followed in two more tort actions against the City and County. See: Sherry v. Asing, 56 Haw. 141 (1975), and Kelley v. Kokua Sales, 56 Haw. 209 (1975).

In Orso v. City & County of Honolulu, 56 Haw. 241 (1975), the Hawaii Supreme Court clarified the extent of the holding in Salavea, supra. "In Salavea, supra, the court dealt solely with the applicability of HRS Sec. 662-4 upon the City & County of Honolulu..... (W)he see no valid reason to extend the applicability of any other provisions of HRS Chapter 662 to the City and County of Honolulu, and hereby specifically

limit the holding of Salavea to the City & County of Honolulu." Orso, supra at 247.

In Breed v. Shaner, 57 Haw. 656 (1977), the Hawaii Supreme Court upheld the Orso limitations on the applicability of H.R.S. Sec. 662 to the counties. The court held that Sec. 662-5, which states that tort actions against the state brought under Sec. 662 will be tried without a jury, does not apply to tort actions against the counties.

While the case law indicates that H.R.S. Sec. 662-4 is the only Sec. 662 provision applicable to the counties, its applicability is limited to the City & County of Honolulu. None of the cases subsequent to Salavea, supra, should be so narrowly construed and I can see no valid reason for any distinction between the City & County of Honolulu and the other three counties. Any application of Sec. 662 to the City & County of Honolulu or to the other three counties seems to be faulty for two reasons.

First, the language of the statute clearly indicates application to the "Employees of the State." H.R.S. Sec. 662-1(2) defines employees as including "officers and employees of any state agency, members of the Hawaii state guard, and persons acting in behalf of a state agency in an official capacity, temporarily, whether with or without compensation." A "State agency" is said to include "the executive departments, boards and commissions of the State but does not include any contractor with the State." H.R.S. Sec. 662-1(1). Justices Levinson and Marumoto point out in the dissenting opinion in Salavea, supra, that a county or City & County is not included in the definition of an employee of the State.

Second, Levinson points out in his dissent in Salavea, supra, that the majority's ipse dixit correlation of counties with the State is contrary to the reasoning of Kamau & Cushie v. County of Hawaii, 41 Haw. 527 (1957), wherein the same court held that the diffences between State and local governments in terms of their law-making powers justified the rejection of the common-law doctrine of sovereign immunity with respect to the latter.

It appears that Sec. 662 is a State Tort Liability Act, not meant to be extended to political subdivisions. While not questioning the validity in lengthening the statute of limitations for county tort liability claims, the proper way to do it would be through the amendment of H.R.S. Sec. 46-72.

The distinction that Orso, supra, seems to make between the City & County of Honolulu and the three other counties appears unfounded in light of Matsumura v. County of Hawaii, 19 Haw. 18 (1908), where the Hawaii Supreme Court (territorial) discussed the nature of political subdivisions in Hawaii - municipalities, counties, and City & County. (Matsumura, supra, is an important case as it establishes municipal tort liability in this jurisdiction, and is thus discussed in more detail later.)

The court in Matsumura recognized that at common law confusing distinctions were made between municipal corporations proper and quasi corporations. Also see: Coffield v. Territory of Hawaii, 13 Haw. 478 (1901). Municipalities or cities were classified as municipal corporations proper, created by the consent of their members with broad corporate powers to promote the private interests of those in the particular locale. On the other hand, counties were classified as quasi corporations, created with a view to the policy of the state at large, for purposes of political organization and general

public interest. Municipalities were held liable for tort violations due to their general corporate nature. However, counties, being involuntarily created political organizations with limited corporate powers, especially without powers to levy taxes, were deemed to be immune from suits in tort, unless a cause of action was provided by statute. See: Russell v. Men of Devon, 2 Term Rep. 667.

In Matsumura, supra, the court recognized that counties in Hawaii bear little resemblance to those at common law and to those of the various states; and that they in fact possess many corporate powers in addition to political duties. The counties of Hawaii were held to be liable for tort violations as municipal corporations. The court made it clear that the City & County of Honolulu was also to be treated as a municipal corporation.

> "They could as well be called 'districts' as 'counties', or, on the other hand, could be called 'city and county,' as has been subsequently done with the Island of Oahu, which has been converted from the 'County of Oahu' into the 'City and County of Honolulu.' S.L. 1907, Act 118. These differences make the extension of immunity to counties in Hawaii merely a blind adherence to nomenclature in the application of an erroneous principle." Matsumura, supra at 34.

Traditional Municipal Tort Liability - Governmental and Proprietary Functions

The theory of non-liability of municipal corporations is that the state being sovereign no suit can be brought against it without consent, and a municipality in performing certain functions as a political subdivision of the state is similarly vested with immunity. The courts have stated time and again that a municipality is clothed with two-fold functions: 1) governmental, political, or public functions, and 2) proprietary, corporate, private or ministerial functions. In the exercise of "governmental" functions a municipality is and agent of the state and is exempt from liability for its failure to exercise them or for the exercise of them in a negligent or improper manner, but for negligence in the exercise of "proprietary" powers a municipality is liable for damages in the same manner as an individual or private person. Kamau, supra at 530. Like states, municipalities may become liable for tort violations of "governmental" functions by consent. (statute or charter) Perez v. City & County of Honolulu, 29Haw. 656 at 659 (1927).

As "governmental" instrumentalities, municipalities are endowed with powers and duties necessary for the establishment and maintenance of government as a political subdivision of the state, employed by it as a means through which it may perform duties that it owes to all citizens alike. On the other hand, as "proprietary" instrumentalities, municipalities are incorporated at the wish of their inhabitants for the special interests and convenience of the particular locality and its people. Traditionally, the underlying test has been, "whether the act is for the common good of all without the element of special corporate benefit, or pecuniary profit. It it is, there is no liability; if it is not there may be liability." Kamau, supra at 534.

The general rule that the municipality is liable for torts committed by its agents in the performance of its private or proprietary functions, but not responsible for torts committed in the performance of governmental functions is almost universally acknowledged. However, as to what is a "governmental" function and what is

a "proprietary" function or "private" act of a municipality is a question on which there is a wide divergence of opinion. Kamau, supra at 530-31.

> "On no subject, perhaps, is there more confusion among decisions, than that of municipal liability for torts. The rule of governmental immunity is subject to a great number of exceptions, many of which are purely arbitrary and without any relation to the grounds upon which the courts please to base the general rule. The whole doctrine of governmental immunity from liability for torts rests upon a rotten foundation." 75 A.L.R. 1196 editorial note.

Attempted distinctions between "governmental" or "public" and "proprietary" or "private" activities of a municipality have been subjected to sharp citicism by the courts and legal scholars. The Hawaii Supreme Court in Mark, Moo & Carter v. City and County of Honolulu, 40 Haw 343 (1953), recognizing the confusion and absurdity created by the existing laws proposed that a modified set of more concise rules governing municipal tort liability be implemented.

An example of the startling results arising from attempts to classify particular functions is the Hawaii case Maki v. City & County of Honolulu, 33 Haw. 167 (1934). In Maki, supra, the City & County was held liable in an action in tort for the negligence of its employees in removing dry garbage, termed as "rubbish," found to be a corporate activity for the benefit of the residents of the municipality. By dicta, the removal of wet garbage (e.g. , entrails of fish or animals, refuse animal or vegetable matter), termed as "garbage," would be classified as a governmental function. The distinction was based on the theory that the removal of "rubbish" was not a necessary protection of the public health as such matter would "contaminate the atmosphere or breed pestilence and disease." Maki, supra at 178.

Development of a Municipal Tort Liability Rule in Hawaii

The tendency of modern times is to extend the liabilities of municipalities for tort actions, either through court decisions or statutory provisions. The following is a survey of the development of county tort liability in Hawaii.

The earliest case establishing county liability for torts was Matsumura v. County of Hawaii, supra, decided in 1908. The county was held liable for the negligence of its servants who, in constructing a highway, diverted a stream of water so that it undermined a large mound or bank consisting of earth and rocks which fell upon plaintiff's land, causing damage to his store, house, and stables. While the court acknowledged that the issue of liability normally turns upon whether the act, the repair of highways, is classed as a corporate or governmental function, it failed to reach such a decision. Instead, the court stated that, "we are of the opinion that under no proper construction of the doctrine of municipal immunity in the performance of government functions can it be held to include immunity for negligence resulting in the direct invasion of plaintiff's private right as an adjacent land owner." Matsumura, supra at 22.

The reasoning in Matsumura, supra, that a municipal corporation is liable for a direct invasion of plaintiff's right as an adjacent land owner, was followed in two subsequent cases. In Halawa Plantation v. County of Hawaii, 22 Haw. 753 (1915), the county was held liable for damages caused to a crop of cane by a fire started by road employees of the county acting within

the scope of their employment. In Mark, Moo & Carter v. City & County of Honolulu, supra, the City & County was held liable to private individuals for damages by fire caused by the negligence of its officers, employees, etc., in permitting electric current to escape from its street-lighting system to a telephone wire and flow into and upon plaintiff's private property.

In Reinhardt v. Maui, 23 Haw. 102 (1915), the county was held liable for failing to repair a defect in a public highway or to guard against injury therefrom resulting in personal injury to one lawfully traveling upon the highway. This case is important for two reasons. First, it expands county tort liability to include not only acts of misfeasance (Matsumura, supra), but also includes nonfeasance. Second, the court ruled that where there is a dangerous situation (defect in the highway) that the county has knowledge of, it has a legal duty to warn the public of such dangers and to repair them.

While the four previous cases all state that the municipality is immune where the tort is committed in carrying out governmental functions but not immune when carrying out proprietary functions, they are by dicta. However, in Perez v. City & County of Honolulu, supra (1927), the City & County was not liable in damages for injury to a person caused by the negligence of its agents and servants in operating a fire engine and police patrol wagon. The court held that the acts complained of which resulted in injury to the plaintiff were done in the performance of governmental functions.

Also, as previously presented, there is the case of Maki v. City & County, where it was held that the city was liable for damages occasioned by the negligent operation of a non-governmental function, namely, the hauling away of dry garbage as distinguished from hauling "wet garbage" which would be a governmental function.

Current Hawaii Rule on Municipal Liability - Rejection of the Governmental and Proprietary Function Distinction

Under the implementation of any County Beach Access Program, it is very likely that municipal liability as to the maintenance of beach parks and easements will be a crucial area of focus. The following is a discussion on the case Kamau & Cushnie v. Hawaii County, 41 Haw. 527 (1957), the most important case concerning municipal liability in this jurisdiction since Matsumura, supra. Kamau, supra, is important because: 1) it rejects the "governmental" v. "proprietary" function test-rule on municipal liability; and 2) it does so by specifically establishing municipal liability in the maintenance of beach parks.

Kamau, supra, is actually a consolidation of two cases both addressing the single issue of immunity or liability of the County of Hawaii for the negligence of its employees. Kamau v. County of Hawaii deals with liability in the maintenance and operation of a county hospital. But, more directly on point, Cushnie v. County of Hawaii deals with liability in the maintenance and operation of a county park.

In Cushnie v. County of Hawaii, the county operated and maintained a public beach park, Kawaihae Park, and employed a caretaker. The county had a regulation that banned bonfires on the sand beach area of the park, to which effect a sign was posted within the park. The caretaker, while on duty, permitted a bonfire to be built on the beach and burn for some five hours, during which time it burned down to live coals

covered with ashes. Plaintiff, a child of two years of age, while running along the sand beach fell into the coals and was burned, resulting in pain and suffering as well as permanent injury to the fingers.

The issue was raised concerning whether the county would be liable for all suits brought against it, be they for breaches of governmental or proprietary functions, under R. L. H. 1945, Sec. 6202 (currently H. R. S. Sec. 61-2(1) which states that the counties of Hawaii, Kauai, and Maui each has the power and liability, "to sue and be sued in its corporate name." The court refused to enlarge the liability of the counties, by citing its earlier decision in Perez, supra, where the court rejected an identical construction of R. L. 1925 Sec. 1721 (currently H. R. S. Sec. 70-6) which authorizes the maintenance of suits against the City and County of Honolulu.

The court in Kamau and Perez, supra, rationalized that the purpose of the statutory sections is to authorize suits against the counties, "when a cause of action which is recognized by law arises. It does purport to enlarge the liability of the municipality so as to include acts for which it would not be liable at common law." Kamau, supra at 548.

The court in Kamau, supra, went on to discuss the confusion and nonconformity in laws governing municipal liability and their underlying rationale. Addressing the issue of maintenance of a public park. the court recognized that there is a split in authority, the weight of authority holding that the maintenance of a public park is a governmental function and therefore a municipality is not liable for torts of its agents. However, other jurisdictions have held that a municipality has a duty to exercise ordinary care in establishing, equipping and caring for public parks to make them reasonably safe for persons using them, and that a municipality is subject to liability for injuries resulting from its failure to do so. Kamau, supra at 545.

In Wax v. City & County, 34 Haw. 256 (1937), the Hawaii Supreme Court held, "Where a municipality owns and controls public parks there is imposed upon it the legal duty to use ordinary care to keep such parks in a reasonably safe condition for the public rightfully using the same." While a duty to maintain parks was recognized, the court did not decide whether such duty results in any municipal liability based on a governmental function.

The court in Kamau, supra, went on to take notice of the expansion of governmental activities, where the nation, states, and municipalities are increasingly carrying out functions once thought to be private. The court also stated that the underlying test as to whether the service performed is for the common good of all or for the benefit of the members of a particular locality is worthless, as all functions perfomed for which public funds are expended are deemed for the public benefit.

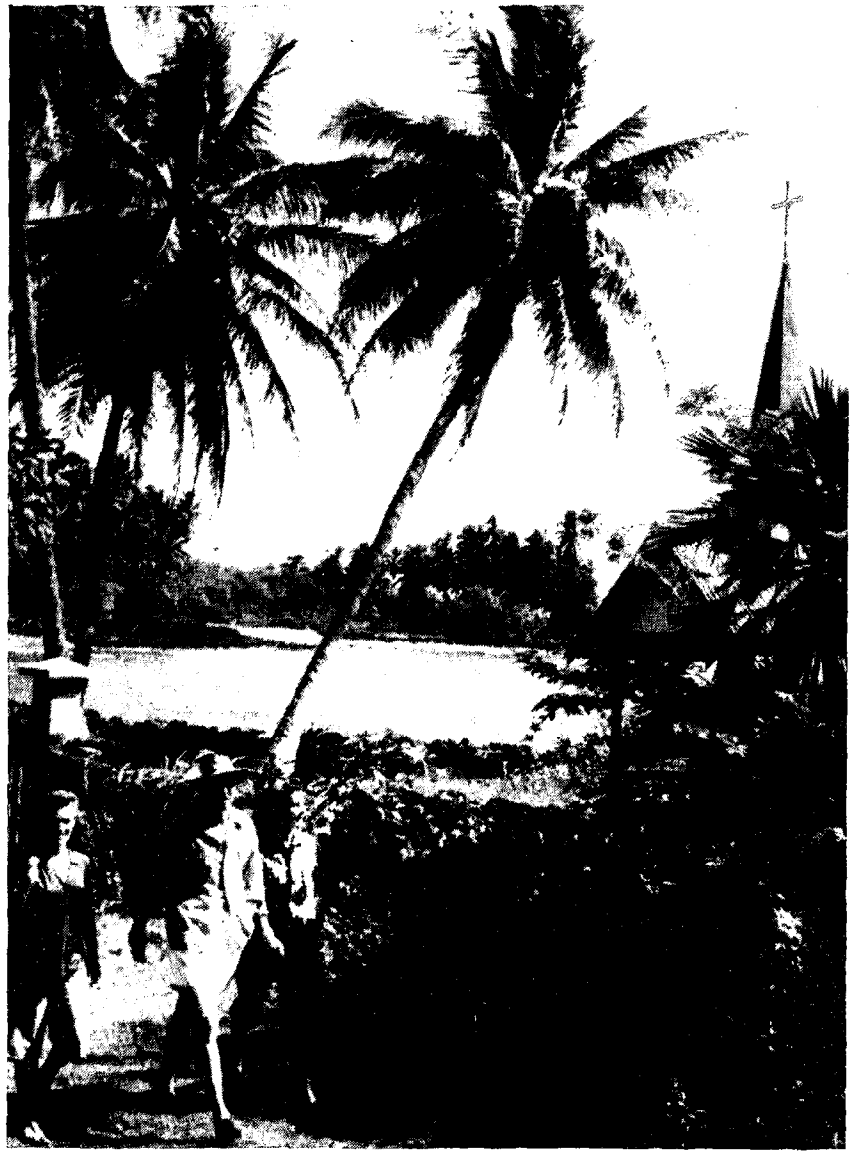
In light of the changing conditions, the court recognized the basic need to adapt itself to the changes and reinterprete them in a modern context; and that stare decisis is a principle of policy not a mechanical formula that should bind a court to precedent when changing conditions and sounder policy call for adjustments in the law. Finally, the court concludes:

> "We are of the opinion that the narrow rule heretofore followed as to so-called 'governmental' or public functions and 'proprietary' or private functions should not control the question of municipal liability for its torts; that where its agents are negligent

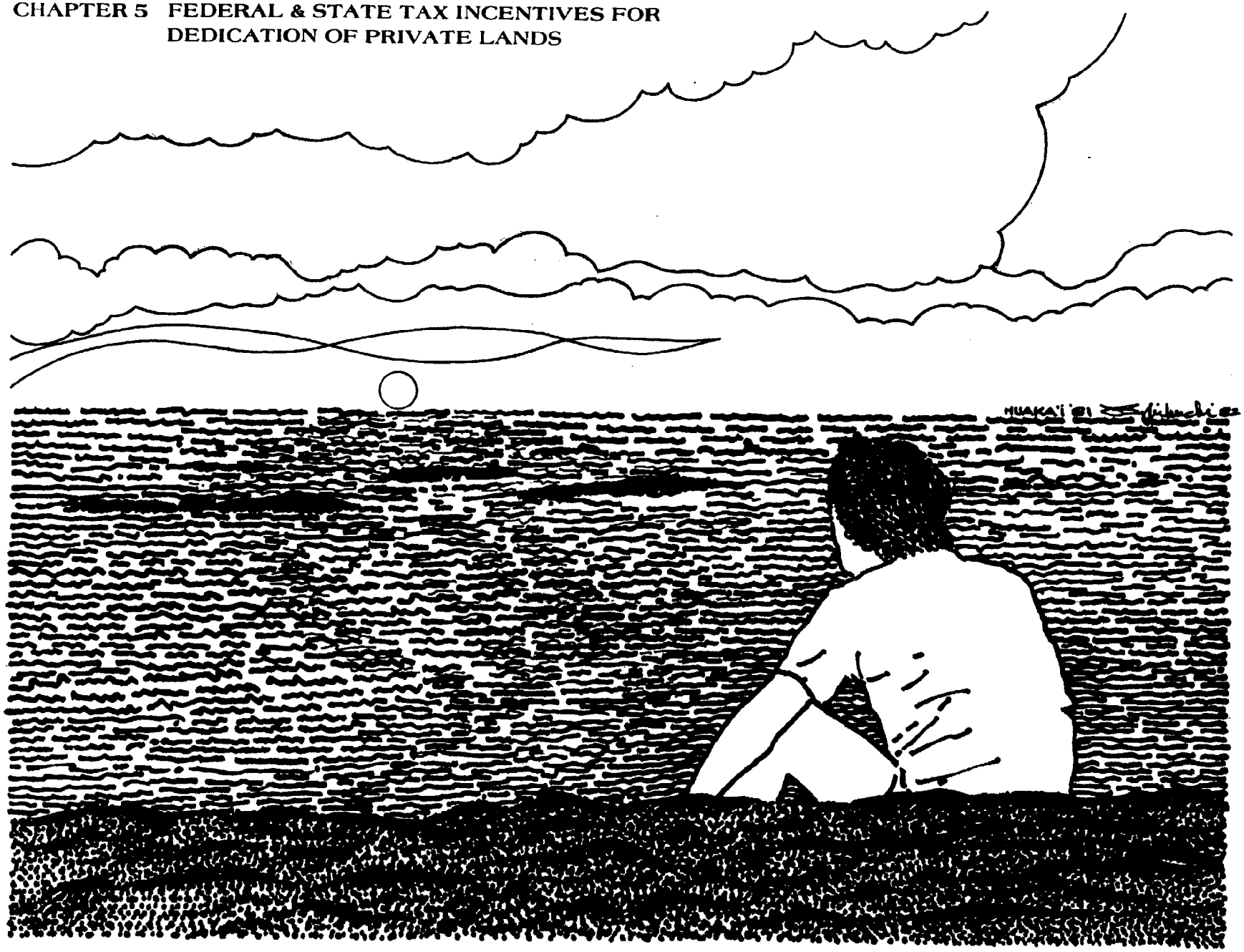
> in the performance of their duties so that damage results to an individual, it is immaterial that the duty being performed is a public one from which the municipality derives no profit or that it is a duty imposed upon it by the legislature.
>
> We therefore hold that it is the duty of the County of Hawaii to use ordinary care to keep the parks in a reasonably safe condition for the public rightfully using them regardless of the fact that no charge is made for the same." Kamau, supra at 552.

The effect of Kamau, supra, is in line with the modern trend to hold governments accountable for their torts. The confusing first step of classifying functions having been removed, municipal liability in this jurisdiction will now turn directly upon the question of pure tort law (ie. duty, breach, causation,etc.)

Recognizing that the establishment of public easements through private lands will be an important aspect of a County Beach Access Program, there is a need to determine county liablility for injuries suffered by easement users. In Levy v. Kimball, 50 Haw. 497 (1968), the plaintiff was injured while walking on a seawall that was a public easement controlled by the state, the ownership in the property belonging to the Halekulani Hotel. The court recognized that a seawall was within the scope of the definition of a public highway, to which was imposed a duty of ordinary care in maintenance upon the controlling government entity. The court then held that control over the easement not ownership of the property determines who is liable for injuries caused by failure to keep the easement in repair.



CHAPTER 5 FEDERAL & STATE TAX INCENTIVES FOR DEDICATION OF PRIVATE LANDS



Providing tax incentives to property owners encouraging them to donate interests in land to the government for recreational purposes may be used as a method for acquiring public beach access. Tax incentives provide an alternative means of acquiring private land that is a lot less expensive and simpler than going through condemnation proceedings. No "taking" issue arises as the surrender of land is voluntary. However, the voluntary nature of such acquisitions is also its weak point.

The following is a presentation of tax incentives available to private landowners who dedicate land for public purposes. On the federal tax level the three primary incentives are 1) Income Tax deductions, 26 U.S.C. 170, 2) Federal Estate Tax deductions, 26 U.S.C. 2055, and 3) Federal Gift Tax deductions, 26 U.S.C. 2522. In Hawaii, state tax exemptions or abatements are awarded to private landowners covering 1) Real Property Taxes for dedicated lands in urban districts, 2) Real Property Taxes for surrender of private land as forest or water reserve lands, 3) State Inheritance Taxes, and 4) State Conveyance Taxes.

Federal Taxes

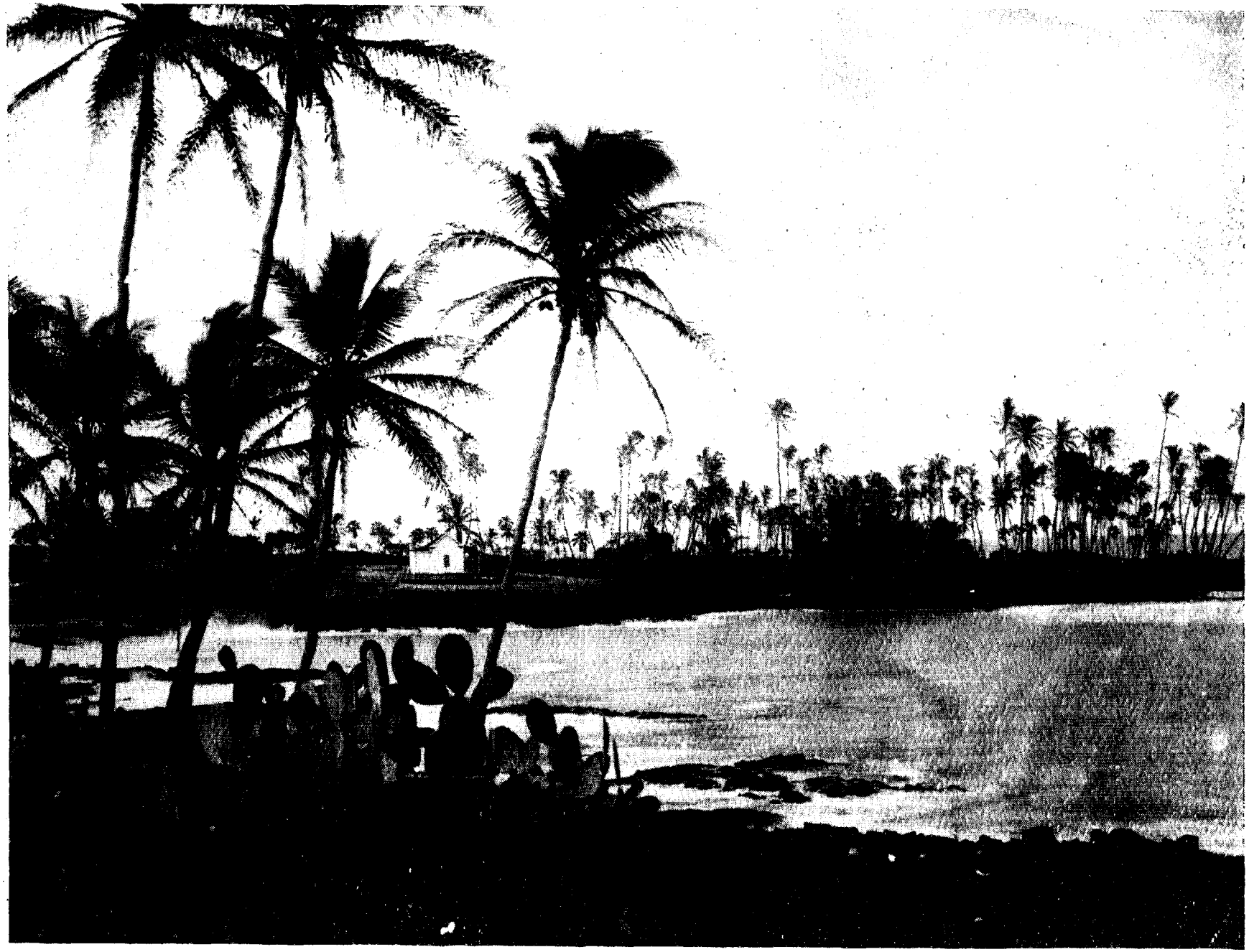
A. Federal Income Tax; Itemized Deductions; Charitable, etc., contributions and gifts, 26 U.S.C. 170.

This section provides for itemized income tax deductions for "charitable contributions," defined as contributions or gifts to or for the use of, "A State, a posession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes. (emphasis added) Sec.170 (c)(1). There are certain limitations places on the amount that can be deducted depending upon the party making the contribution. As a general rule, an individual may deduct up to 50% of his taxpayer's contribution base for the year. Sec. 170 (6)(1)(A) "Contribution base" is defined as the adjusted gross income. Sec. 170 (b)(2). A corporation may deduct up to 5% of its annual taxable income. Sec. 170 (b)(2). For either type of taxpayer, excess contribution may be carried over through five succeeding tax years. Sec. 170 (d). Real property is appraised at its fair market value at the time of contribution.

As a general rule, subject to a few exceptions under Sec. 170 (f)(3)(B), no deduction is allowed for less than a contribution of the donor's entire estate in the property. Therefore a contribution of a lease interest or term of years in property would not be entitled to a deduction. Reg. Sec. 1.170A-7(a). However, to the extent that their value may be appraised, contributions of less than fee title interests such as easements and licenses may be deducted. Fair v. C.I.R., 27 T.C. 866 (1957). As the acquisition of easements may be a very desirable part of a beach access program, especially in coastline areas already developed or where costs are prohibitive. this applicability of deductions to dedications of easements is an important incentive.

A "charitable contribution" has been construed to mean that the incentive or motive behind the gift must be that of detached and disinterested generosity or that of affection, respect, admiration, charity, or like impulses. When the contribution is made for ulterior business purposes it is not deductible under Sec. 170. Transamerica Corp. v. U.S., 254 F. Supp. 504, affirmed, 39 F. 2d 522 (1966).

B. Federal Estate Tax; Transfers for public, charitable, and religious uses, 26 U.S.C. 2055.



(a)(1).

This section applies to the taxable estates of U.S. citizens and residents where the gifts are testementary. Testators who are worried about the effects beachfront properties may have on increasing the value of their taxable estate (ie. higher estate taxes) and the burdens that may be imposed upon legatees unable to pay inheritance and property taxes, should be encouraged to make testamentary gifts to the government.

C. Federal Gift Tax; Charitable and similar gifts, 26 U.S.C. 2522.

This section provides for deductions from the federal gift tax which is calculated quarterly. Included in the deductions are, "the amount of all gifts made during such quarter to or for the use of... the United States, any State, or any political subdivision thereof, for exclusively public purposes." (emphasis added) Sec. 2522 (a)(1). While Sec. 2522 (a)(1) applies specifically to citizens or residents, an identical provision applicable to foreign nonresidents is provided for in Sec. 2522(b)(1).

This provision differs from Sec. 2055, Federal Estate Tax deductions. in that here intervivos gifts are dealt with as opposed to testimentary gifts, and here the transfers include those made by both residents or citizens, and foreign nonresidents, as opposed those limited to residents or citizens.

State Taxes

A. Real Property Tax exemption for dedicated lands in urban districts, H.R.S. Sec. 246-34

This section allows the landowner a property tax exemption for the portion or portions of lands in urban districts dedicated for "landscaping, open spaces, public recreation, and other similar uses." (emphasis added) Sec. 246-34 (b). Open spaces are defined as, "lands open to the public for pedestrian use and momentary repose, relaxation and contemplation." Sec. 246-34 (h). Lands for public recreation are defined as, "lands used for public park, playgrounds, historical sights, camp grounds. wild life refuges, scenic sites, etc." Id.

The dedicatory status of the land is for a minimum ten year period, automatically renewable indefinitely, subject to cancellation by either the owner or director of taxation upon five years' notice any time after the end of the fifth year. Sec. 246-34 (c). The landowner must petition the director of taxation for tax exempt status approval.

Dedications of urban lands, where beach access is likely to be most in demand, should be encouraged upon property owners who are unable to pay property taxes and/or maintain the land, as an alternative to sale. Note, that according to the State land use control laws, counties have exclusive control over zoning regulations and ordinances in their respective urban districts. The obvious drawback for the government in obtaining such land is the possible subjection to termination by the landowner with five years' notice.

B. Property Tax exemptions for lands surrendered as forest or water reserve lands, H.R.S. Sec. 183-15

Under this section, "any person may, on agreement with the department of land and natural resources, at any time surrender to the government the care, custody and control of any lands, whether held under lease or in fee, as forest or water reserve lands, either for a term of not less than twenty years, or forever... No taxes shall be levied or collected on

any private lands so surrendered so long as the land remains exclusively under the control of the government as a forest reservation." Sec. 183-15.

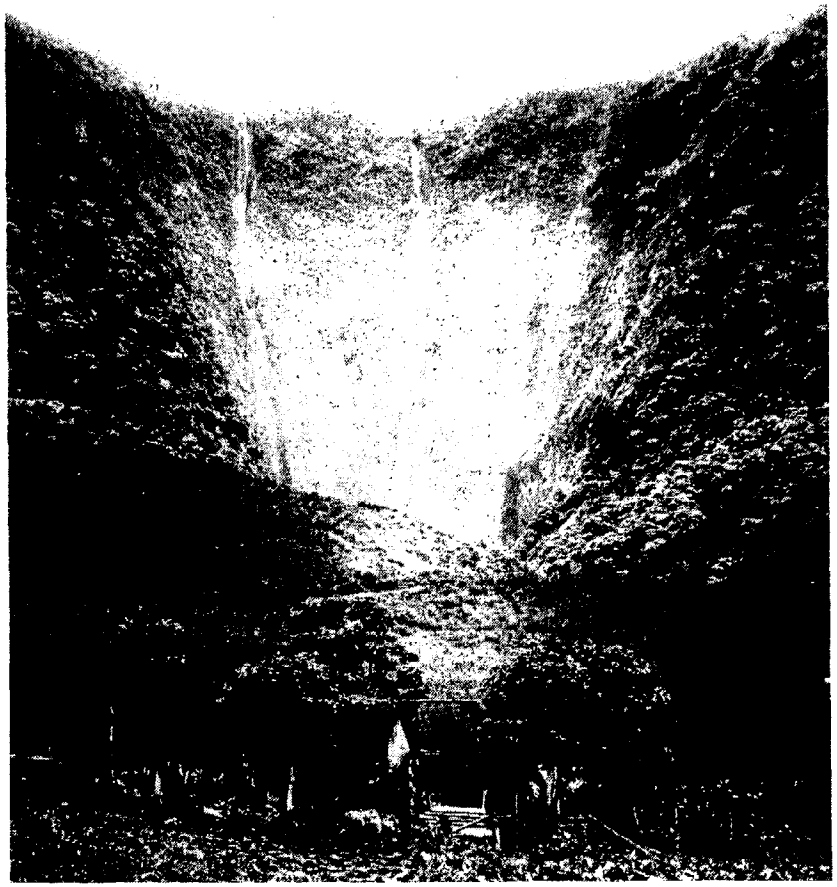
This surrender of land provision may be a very effective way of getting large tracts of private forest and water reserve lands which are unused but nevertheless subject to real property taxes, under public control. Note, however, that under the State land use control laws the zoning of forest and water reserve lands, classified under conservation districts, are exclusively under the control of the Department of Land and Natural Resources. Sec. 205-5. In other words, they are beyond the powers of county zoning regualtion. The obvious drawback of obtaining land through surrender is that any surrender less than forever is subject to the reversionary interest of the private landowner.

C. State Inheritance Taxes, Sec. 236-8

This section provided in part that all property transferred to any "public corporation" are exempt transfers for purposes of calculating state inheritance taxes. In other words, rather than being an incentive for private landowners to dedicate lands, its primary effect is save a recepient public corporation from inheritance tax liability. The actual benefit to the landowner is a deduction on his federal estate tax.

D. Conveyance Tax Exemption, H.R.S. Sec.247

Conveyance taxes are imposed on transfers or conveyances of realty, or interests therein, to be paid by the grantor, lessor, sublessor, assignor, transferor, seller or conveyor. Sec. 247-1,4. Although ten exemptions to the tax are recognized, the one most likely to prove to be some incentive to beach front owners who transfer property to the public, is the exemption on the tax imposed on "(a)ny document or instrument which solely conveys or grants an easement or easements." Sec. 347-3. Note, however, that the incentives for exemption of a conveyance tax are very minimal due to the fact that the tax is assessed on the rate of only five cents per one hundred dollars of consideration. Sec. 247-2.



The foregoing chapters reveal that Hawaii's legislature and courts have attended significantly to the subject of public access to the shoreline and, thus, to the variety of recreational and customary pursuits long enjoyed by the people of the islands. In addition to applicable case and statutory law, there are several theoretical bases available to establish the right of the public to such access.

Still, there are practical limitations to the implementation of public access to the shoreline. Costs of acquisition and development of land are high. In many areas, the great distance between the shoreline and the nearest public street often makes public access impracticable. The extent of developed access ways is inhibited by the municipality's ability to properly open and maintain such areas.

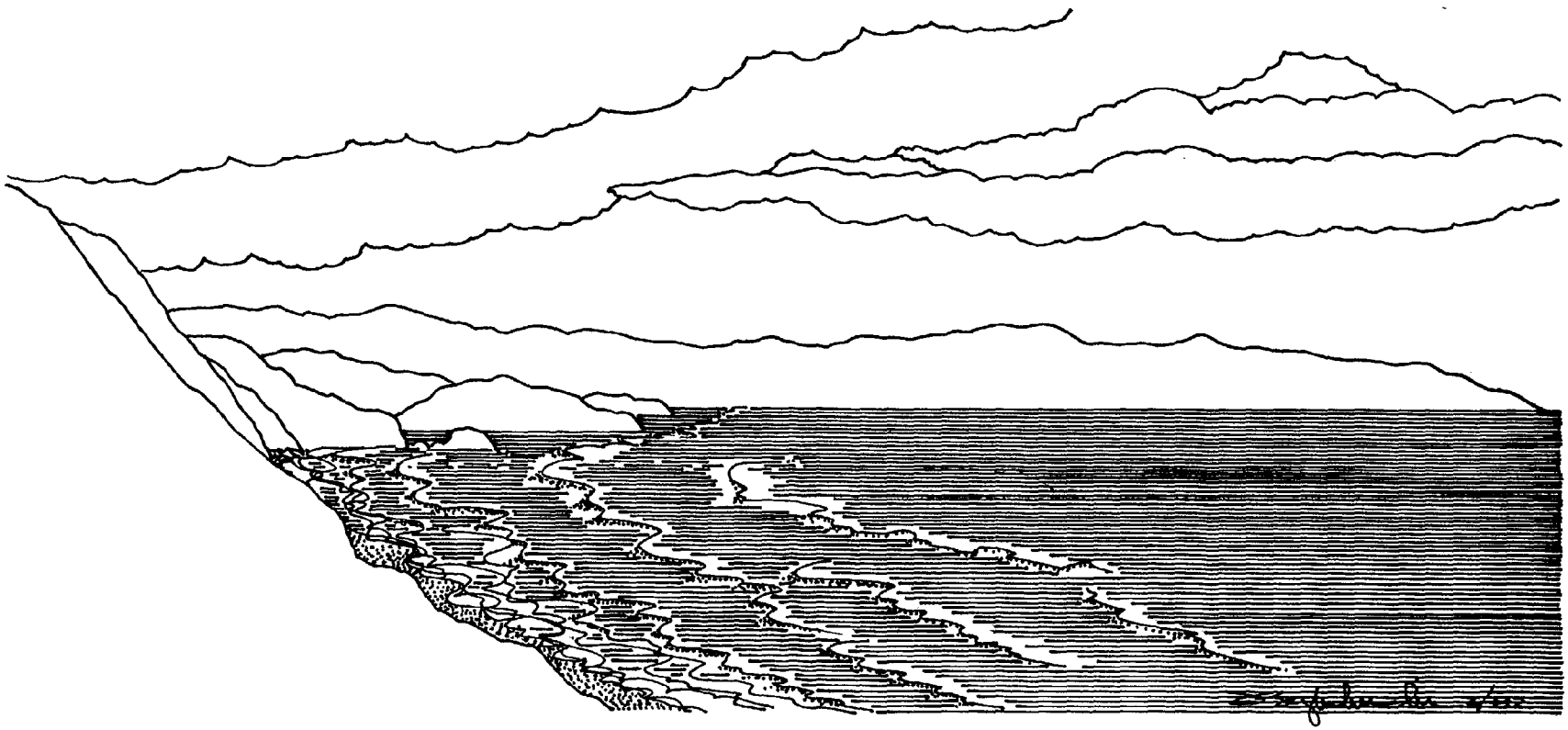
Other limitations arise as a result of the potential liability of a municipality in its regulatory actions to acquire land for public access and in its development and maintenance of such areas.

Nevertheless, on the basis of existing law and further supportive legislation, Hawaii's State and County governments will be able to fashion programs to provide and ensure increased access to the shoreline for the people of Hawaii.

CALIFORNIA COASTAL ACCESS PROGRAM
INTRODUCTION

As a supplemental portion of this research project, a limited study was conducted on the approach taken by California to manage and preserve its coastal areas. Focused on the public-access subject, this study is based on a recognition that California and Hawaii share many common objectives and problems relating to public access which result from the widespread use of the coastal areas by the public, the increasing demand for that use by an ever-increasing population, and the increasing inaccessiblity of such areas due to inadequate developmental controls.

This study merely provides an initial review of California's overall plan, presenting the possibility that the County of Hawaii will do further analysis of the methods and ideas which are employed by California and which would seem to be desirable and feasible here. Such further analysis would accompany a subsequent phase of the Public Shoreline Access Program in which an implementation plan and specific courses of action would be developed.



Californians have long recognized the importance of the need to adequately control and manage their coastlines. In 1972, the voters overwhelmingly endorsed Proposition 20 (the Coastal Initiative), creating a temporary state agency charged with protecting coastal resources and coastal access. The California Coastal Act of 1976 established the California Coastal Commission as a permanent agency, its purpose to make recommendations and guide other public agencies in the development and maintenance of the coastline areas. Also, in 1976, the State Coastal Conservancy was established by the Coastal Conservancy Act and given a principal role in implementing a system of public accessways to and along the state's coastline, chiefly through the provision of funds to acquire and develop public coastal accessways.

By 1979, it became clear that the state's efforts to effectively manage the coastline was not being fully realized due mainly to a lack of coordination between responsible governmetal units and an incomplete mechanism for paying the operation and maintenance costs of increased public access. Accordingly, in 1979, the state legislature established a comprehensive coastal access program, designating the Coastal Commission and State Coastal Conservancy as the joint lead agencies. These joint agencies are responsible for designing the comprehensive access program and coordinating all local, state and federal efforts to implement the program.

Due to the comprehensive and well-coordinated nature of this statewide program, any other state hoping to implement a coastal access program, should examine the California approach. The joint commission has begun by preparing an access inventory and guide to all coastal accessways. The joint commission has been developing a comprehensive list of standards and recommendations for coastal access by examining: 1) the functional criteria for providing access, 2) the definitions, specifications and costs of coastline access, 3) a system for effectively locating and distributing accessways, 4) the accessway and facility management responsibilities, 5) the appropriate management agencies, and 6) innovative management and funding techniques. Reference should be made to the Joint Staff Report on Standards and Recommendations for Coastal Access, Coastal News, Vol. 3, No. 6, Oct./Nov. 1980, for a general rundown of these concerns.

The following is a brief review of California's approach to solving access problems dealing with 1) funding, 2) maintenance and management and 3) liability These problems are interrelated with funding limitations being a common handicap. Before going any further, it should be emphasized that the novel approach taken by California in solving its coastal problems represents a comprehensive statewide plan. However, under the statewide plan, it is envisioned that the local governments play an important role in developing local coastal programs by identifying all existing and proposed access areas and proposing a program for their acquisition, improvement and management.

A. FUNDING

The problem that California faces in regards to securing adequate funds, especially to pay for facility development, operation, maintenance, liability and spin-off (e.g., need for more police) costs, can be seen in the fact that currently there are more accessways than the government is willing to take responsibility for. For a detailed breakdown of the estimated value of the costs involved, see the Joint Commission Report on Innovative Management and Funding Techniques for Coastal Accessways (I.M.F.T.), pp. 8-14, January 1981.

In California, the Coastal Commission is in charge

of approving development permits conditioned on dedication of accessways. As of January 1981, over 500 such offers to dedicate were unaccepted and the proposed accessways remained closed to the public. This was primarily due to a lack of funds available to local governments and agencies for accessway management and maintenance. Also, hundreds of potential access easements along the coastline remain closed for the same reasons.

The joint commission has proposed several innovative means to raise revenues that could be made available to local governments, state of federal agencies, local non-profit organizations or to a statewide coastal access trust (covered in following section) through administration by the State Coastal Conservancy. They include: 1) voluntary state income tax "add-ons", 2) voluntary license plate fee "add-ons", 3) part of the fees from vanity (personalized) license plate sales, 4) part of the Tidelands Oil Revenue, 5) profits from accessway concession, 6) a voluntary fee system, 7) private sector constritutions, 8) fund-raising events by a Coastal Access Trust, and 9) a combination of the foregoing techniques to provide an endowment fund for on-going management and operation expenses. For a more detailed explanation of these techniques, see I.M.F.T., pp. 14-16.

B. MAINTENANCE & MANAGEMENT

Basically, the Joint Commission proposes two systems of management, 1) through the traditional public sector and 2) an alternative system based on a private statewide non-profit land trust. Under the traditional approach, the Joint Commission has set up a system by which different government entities are offered the opportunity to accept lands dedicated to the public.

Under the traditional approach, as a general rule, offers to accept responsibility for accessways are first given to local governments, with the joint commissions providing aid in securing funding. Concurrent with these initial offers to local governments, local private non-profit organizations (e.g., land trusts or service organizations) should also be approached regarding the assumption of accessway operation and maintenance duties. Where this occurs, the local government would retain legal control of the accessway, and arrangements would be made with the local non-profit organization for operation and maintenance.

If a dedication offer is not accepted by the local government or non-profit organization, it should be offered to the appropriate state agency. In general, the considerations of assigning access responsibilities and making offers to state agencies include: proximity to existing facilities or areas under agency control, level of potential public use of the accessway, visibility from the nearest state highway, and proximity to environmentally sensitive habitats or wetland areas. The concerned state agencies include the Department of Parks and Recreation, the State Lands Commission, the Department of Transportation, and the Department of Fish and Game. A few situations may also exist where the dedication should be offered to a federal agency, such as where an accessway is in proximity to a national park. For details of the criteria used to offer dedications, see Standards and Recommendations for Coastal Access, pp. 11-13.

The joint commission recognizes that an alternative to traditional governmental operation of access facilities is necessary for two reasons: local governments and state agencies increasingly disclaim their need to undertake such responsibility and conventional sources to fund such activities are diminishing. At the same time,

it has been recognized that there was no overall state priority to encourage and stimulate citizens to give of themselves voluntarily for the benefit of others and for the resources of the state. The joint commission suggests that a major portion of coastal access facility operation and maintenance be carried out by an independent, private non-profit corporation. Such an alternative is based on concepts of stewardship and volunteerism. "Stewardship" involves private management of public resources for the benefit of all.

The joint commission proposes that a statewide non-profit corporation (California Coastal Access Trust) would manage, operate, and maintain access facilities under contract or lease from the government agencies which own such facilities. In turn, the Coastal Access Trust would subcontract with a local group, such as a service organization or local non-profit organization, to provide the necessary maintenance services for a fee. The local group would then secure volunteer efforts from its membership in fund-raising and organization activities. On-going funding for the Trust would be derived from a combination of techniques presented in the earlier section on funding. However, the joint commission envisions that the bulk of the funding would come from the operation of profitable recreational concessions at public park facilities along the coast, the net proceeds going to the operation and maintenance of coastal accessways. While it is critical that the non-profit trust be self-sustaining, the availability of adequate start-up capital must be assured. The joint commission suggests that the State Coastal Conservancy provide such funds for the first five years, allowing the trust to build itself up to self-sufficiency. As proceeds would be pooled together under one common fund, money can be equitably distributed throughout the state, assuring that funds will be given to areas which are most needy.

A major advantage of such a trust system is the innovation that can be applied to funding and management, free of normal bureaucracy and government constraint. Other advantages include the sense of civic pride, accomplishment and cooperation that members of the community will realize, and the arousal of civic consciousness concerning the problems of the environment.

C. LIABILITY

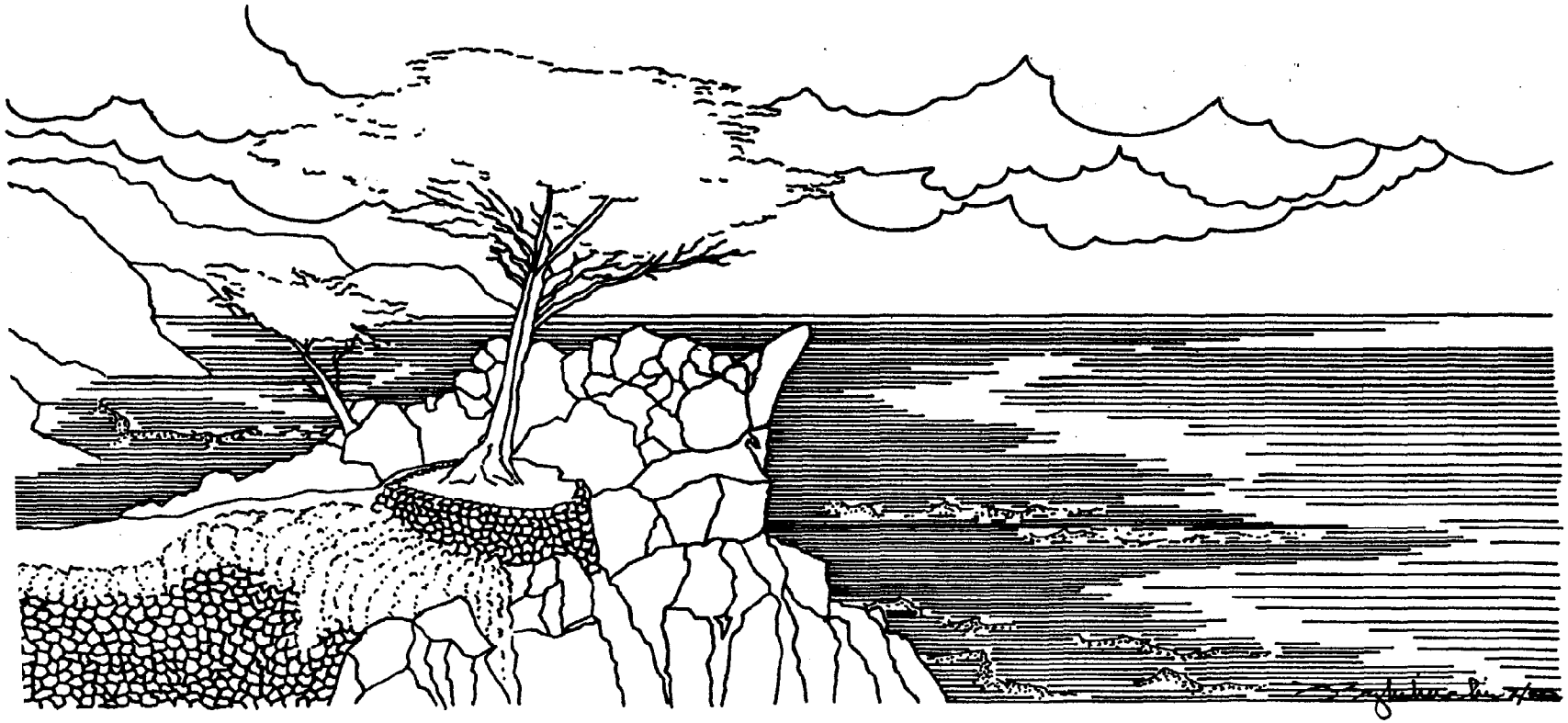
California has very strong statutory provisions that protect agencies and organizations which accept responsibility for operation and maintenance of coastal accessways from personal injury liability. Under Government Code Sec. 831.4, a public entity, public employee, or grantor of a public easement to a public entity who provides access to water recreation and scenic areas, is immune from liability for injuries occurring on such paved or unpaved accessways. However, where dangerous conditions exist on paved accessways, the responsible party has a duty to post reasonable warning, and the failure to do so may give rise to liability.

According to the joint commission, other recent legislation has also created immunities under most circumstances for coastal public land trusts which maintain coastal accessways and have entered into specific agreements with the State Coastal Conservancy. See I.M.F.T., p. 13. Statutes provide for government and government employee immunity for injuries arising out of natural conditions of unimproved or unoccupied portions of certain public lands. California Code Sec. 831.2, 831.6.

CALIFORNIA COASTAL ACCESS PROGRAM (cont.)

A review of the trend in accessway legislation reveals the clear favored public policy to increase coastal access even at the expense of traditional rules of tort liability. The legislative comment to Sec. 831.2 explains the state's policy. It is notable that the policy has been expanded to cover improved accessways under Sec. 831.4.

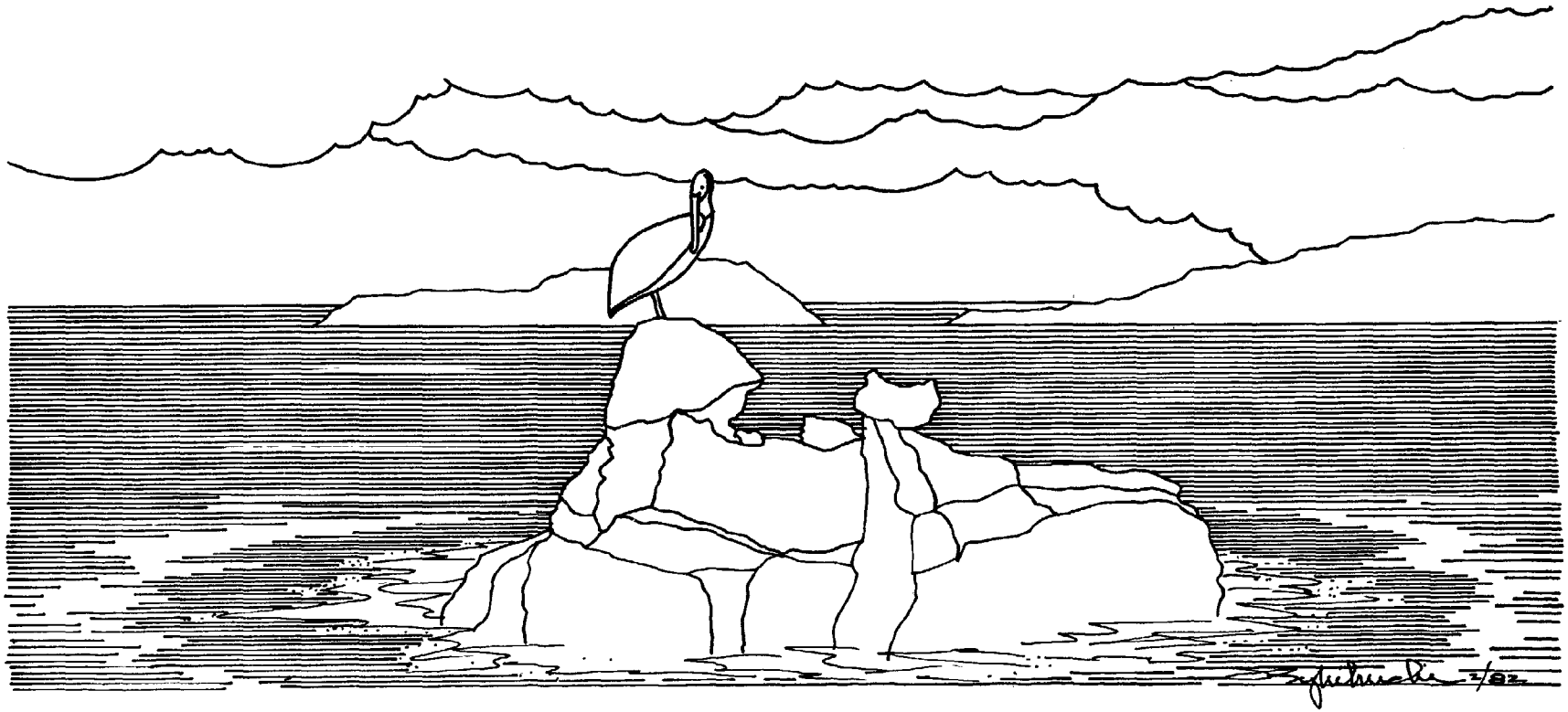
> "It is desirable to permit the members of the public to use public property in its natural condition and to provide trails for hikers and riders and roads for campers into the primitive regions of the state. But the burden and expense of putting such property in safe condition and the expense of defending claims for injuries would probably cause many public entities to close such areas to public use. In view of the limited funds available for the acquisition and improvement of property for recreational purposes, it is not unreasonable to expect persons who voluntarily use unimproved public property on its natural condtion to assume the risk of injuries arising therefrom as a part of the price to be paid for benefits received." California Code Sec. 831.2, Legislative Committee Comment.



California's approach is based on a strong state legislative plan for adequate management and preservation of the coastal areas. Statutory protection of participating public and private bodies from liability addresses a long-standing problem for such entities.

California has demonstrated innovation in its approach, such as the private state-wide non-profit land trust and the related use of volunteers in the management and operation of access facilities.

These and other aspects of California's approach seem worthy of further study. Effective legislative action and innovative ideas are characteristics which have the potential of facilitating an effective public shoreline access program for the County of Hawaii.



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With your cooperation we are able to visually share
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